DIVORCE EXPLAINED

The author is a former Assistant Principal Clerk of the Divorce Registry at Somerset House, and has had twenty years' experience of divorce law and practice. He wrote the first recognised legal textbook dealing with the act of 1937 —"**Practice of the Divorce Division**"—and a smaller book on the same subject.

The important recent amendments to the divorce laws are dealt with in detail.

BY THE SAME AUTHOR:

PRACTICE OF THE DIVORCE DIVISION
(3rd Edition)

JUDGMENT SUMMONSES
IN THE DIVORCE DIVISION

PROBATE AND ESTATE DUTY PRACTICE
(4th Edition)

DIVORCE EXPLAINED

Being an explanation, in simple language, of the law of divorce, and in particular, sound advice for those who contemplate taking divorce proceedings

by

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Abbreviations used in the citation of Law Reports

A.C. . . .	Law Reports, Appeal Cases.
All E.R. . .	All England Law Reports.
L.J.P. . . .	*Law Journal*, Probate.
L.T. . . .	*Law Times* Reports.
L.T.J. . . .	*Law Times Journal.*
P. . . .	Law Reports, Probate.
Q.B. . . .	Law Reports, Queen's Bench Division.
Sol. J. . . .	*Solicitor's Journal.*
T.L.R. . .	*Times* Law Reports.
W.N. . . .	*Weekly Notes.*
W.R. . . .	*Weekly Reporter.*

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CHAPTER I

CONCERNING THE MATRIMONIAL RELIEFS AVAILABLE

Dissolution of marriage; Presumption of Death and Dissolution of Marriage; Judicial Separation; Nullity of Marriage; Restitution of Conjugal Rights; Damages.

THE GRANT OR refusal of relief from the bonds of marriage is within the jurisdiction of the Probate, Divorce and Admiralty Division of the High Court of Justice. An inferior concurrent jurisdiction is also vested in magistrates' courts, but this is limited to the granting of separation orders and the making of maintenance orders in certain well-defined cases.

Whatever form of matrimonial relief is required of the Divorce Division, application must be made for it by petition. This procedure is a relic of the days when there was no statute law regulating the relief that could be granted to persons who were unhappily married. It was not then a matter of law, but one of the discretion of the King, or of the ecclesiastical judges appointed by him. The approach therefore had to be humble, and then, as now, took the form of a "Humble Petition".

Today, the requirements to found an application in a matrimonial matter are regulated by statute law. If these requirements be fulfilled, relief is granted as of right, unless matters arise in the course of the proceedings which call for the exercise of a discretion that is vested in the judge by the statutes. The form and essentials of a petition and of the subsequent procedure are governed by rules made under the authority of the statutes.[1]

Whether a suit be defended or undefended, the same measure of proof of the facts alleged is required. The only difference between an undefended and a defended suit is that in the former, the proceedings are confined to an examination of the petitioner and witnesses by the counsel for the petitioner, whereas in the latter, all the parties and their witnesses are examined and cross-examined on the evidence they give, by the counsel representing each of the parties. There can be no judgment in default of defence, and the charges made must be proved beyond reasonable doubt. It is in this that the vital difference between a matrimonial

[1] Matrimonial Causes Rules, 1944.

cause and a civil action arises. In a civil action, default in entering appearance and in filing a defence, is taken as an admission of the truth of the charge or claim made. Judgment is consequently given for the plaintiff without further proof. If this were allowed in a matrimonial suit, it would open wide the door to collusive actions, and to the suppression of the true facts of the difficulties of a marriage, especially in cases where both parties to the marriage are anxious and desirous for relief. The Divorce Court, therefore, will not accept default in the entry of appearance and in making answer to the charges in the petition, as an admission of their truth. It demands and obtains strict proof in open court of those matters.

The form of relief that may be granted by the Divorce Court is dependent upon the nature of the offences charged and the extent of relief from the bonds of marriage that the petitioner desires. The jurisdiction of the court to grant relief is dependent upon its nature, being sometimes dependent upon the domicile of the parties, sometimes on their place of residence, and even sometimes upon the country in which the marriage was celebrated. Particular regard must be had to these facts in relation to the form of relief that is sought, for the first thing to be established is that the court has jurisdiction to determine the matters in question.

Nature of relief available

As determined by the facts of the case, and the desire of the petitioner, a spouse may ask for any one of the following forms of relief,—that the marriage be completely dissolved; that the parties to the marriage live separate and apart from each other; that the marriage be declared to be a nullity, that is to say, that there was not, and never had been a valid marriage subsisting; that a party to a marriage who has deserted the other, shall return and cohabit with that other; that a wife's paramour be ordered to pay damages to her husband in respect of the adultery committed. The purpose of each of these remedies and the evidence that must be adduced to obtain them, differ very materially. They must therefore be dealt with separately.

DISSOLUTION OF MARRIAGE

Dissolution of marriage is commonly called divorce, and has the effect of completely bringing to an end the contract of marriage. The old ecclesiastical lawyers used to call it by the vivid term "divorce *a vinculo matrimonii*", meaning thereby a breaking of the chains of marriage.

Domicile

To qualify for divorce in England or Wales, the parties must be domiciled in one of those countries at the time of the commencement of the proceedings for divorce. Similarly, for a foreign divorce to be recognized as valid in England or Wales, the parties must be domiciled in the country whose courts granted it. As the domicile of a wife is that of her husband, it follows that no divorce can be granted in England or Wales unless the husband was domiciled there at the time of the commencement of the proceedings.

To determine the domicile of a person, two factors must be taken into account,—actual residence in the country in which domicile is claimed, and an intention to make that residence a permanent one. The first is a question of fact that is comparatively easy of proof; the second is a state of mind that can only be established by an examination of the circumstances surrounding the residence in the country in question.

Where a person has been born and has always lived in England or Wales, he must be domiciled there. The country in which he was born gives him a "domicile of origin", and as he has never left that country to reside elsewhere, he retains that domicile. A removal to England from Wales, or *vice versa*, does not affect the matter, for English and Welsh domicile are the same in law. But if a person were born out of England or Wales, but removed into England or Wales, the question of his domicile is dependent upon the facts of his removal. If, at the time he changed his country of residence he had the intention of making a permanent home in the new country, or, if having removed to the new country he decided that he would make his permanent home there, he abandons his domicile of origin and immediately acquires a "domicile of choice". This remains his domicile until he removes to another country with the intention of residing there permanently.

Actual residence in a country is generally easy of proof, but not so the intention of permanent residence. In the absence of an expression of an intention to make a permanent home in that country, it can only be determined by an examination of the surrounding circumstances. These would be the length of the period of residence, the nature and permanence of his occupation, the purchase of property (especially house property), the nature of his friendships, or any other facts that might point to a permanent settlement. From these, an intention to make a permanent home in that country can be inferred. In practice,

where domicile is not a disputed matter, an inference of domicile will be drawn from small indications.

The determination of domicile presents no difficulties in divorce matters when the husband was born and has always been resident in England or Wales, but it may do so when it is otherwise. In all cases where a person has come from abroad to reside in England or Wales, and subsequently applies for a divorce here, it must be first established that he has acquired a domicile in England or Wales. The term "abroad" includes Scotland, Northern Ireland, Eire, the Channel Islands, and the Isle of Man, which generally are not considered to be foreign countries.

Exceptions to the rule of domicile

There are two exceptions to the rule that the domicile of the husband at the date of the institution of a suit determines the Court that has jurisdiction. The one arises when a wife has been deserted by her husband, or he has been deported from the United Kingdom, and immediately before the desertion or deportation he was domiciled in England or Wales. In those circumstances the wife may take proceedings for divorce even though the husband has changed his domicile since the desertion or deportation.[1]

The other arises out of the wartime marriages of persons domiciled in England or Wales immediately before their marriage who have married persons domiciled out of the United Kingdom on or since the 3rd day of September, 1939, and before the end of the war. The exception only applies if (1) the husband has not acquired a domicile in any part of the United Kingdom since the marriage (2) the husband and wife had not at any time since the celebration of the marriage resided together in a country in which the husband was domiciled at the time of such residence, and (3) proceedings for divorce are taken not later than three years from a day to be appointed. If these requirements are fulfilled, the courts of England and Wales have jurisdiction to grant a divorce notwithstanding that the husband was domiciled out of the jurisdiction at the time when application for a divorce was made.[2]

Qualifying period of marriage

No petition for divorce may be presented unless, at the date of its presentation, three years have elapsed since the date of the

[1] Matrimonial Causes Act, 1937, S.13.
[2] Matrimonial Causes (War Marriages) Act, 1944.

marriage.[1] This restriction does not apply to those wartime marriages which provide an exception to the rule that the court having jurisdiction is the court of the place where the husband was domiciled.[2] Parties to such wartime marriages may therefore sue for divorce without having been married for the minimum period of three years.

There is a discretion vested in the judges of the Divorce Division to waive this rule. Any application for the exercise of this discretion must be made to a judge before the petition for divorce is presented. At the hearing of the application, the person who desires to lodge a petition must establish that the operation of the rule in his or her case would result in exceptional hardship, or, that the conduct of the other party to the marriage has been of such exceptional depravity that it would be unjust to compel the parties to remain married even for the minimum period of the three years that might remain. Before giving a decision in the matter, the judge must consider the interests of any children that may have been born of the marriage, and must carefully examine the marital relations of the parties to see if there is any reasonable possibility of their being reconciled before the three year period has come to an end. Once the judge has made his decision, it is only in very exceptional circumstances that there can be an appeal to a higher court. The exercise of this discretion is very guarded, and the penalty for presenting a false case on an application, may be the dismissal of the petition that may be presented on the leave given, or the postponement of the decree absolute in such petition for a period of three years from the date of the decree *nisi*.

Grounds for Divorce

Provided that three years have elapsed since the date of the marriage, or that a judge has granted leave to waive or reduce that requirement, a divorce may be granted on proof of any one or more of five distinct offences or condition of mind.[3] Either party to a marriage may petition for divorce on the grounds of adultery committed by the other party since the celebration of the marriage: of the desertion of the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition: of cruelty towards the petitioner since the celebration of the marriage: of the incurable unsound-

[1] Matrimonial Causes Act, 1937, S.1. (1).
[2] Matrimonial Causes (War Marriages) Act, 1944, S.1. (1) (*b*).
[3] Supreme Court of Judicature (Consolidation) Act, 1925, S.176, as amended by the Matrimonial Causes Act, 1937, S.2.

ness of mind of the other party to the marriage, provided that such party has been under continuous care and treatment for a period of five years immediately preceding the presentation of the petition. An additional ground for relief is available to a wife, who may present a petition on the grounds that her husband has been guilty of rape, sodomy or bestiality.

Adultery

Adultery is sexual connection between two persons of opposite sexes who are not married to each other, but of whom one at least is married to a third party at the time of the offence. The offence must be committed voluntarily by each of the parties to it, and so the rape of a woman does not constitute adultery committed by her. Although the sexual connection must be complete, that is to say, it must have resulted in penetration, it is not necessary to prove that fact. The offence will be deemed to have been committed if it be established that the parties were in such a position, or in such circumstances that the inference could reasonably be drawn. Of course, if it be proved that the woman is a virgin, it is *prima facie* evidence that adultery has not been committed. "Impropriety", "misconduct", "misbehaviour", "intimacy", or such like terms should not be used to describe adultery, despite the fact that they are used in newspaper reports of divorce cases presumably to avoid offending a sensitive public. The use of such terms is apt to cause confusion as to the precise nature of the offence, upon proof of which relief can be claimed.

Adultery is rarely proved by the evidence of eye-witnesses of the act. It is in its nature a secret offence, and so, whenever it is sought to prove it by the evidence of an eye-witness, the evidence is most carefully examined and tested. In the majority of cases, adultery is proved by circumstantial evidence of a nature that would lead the guarded discretion of a reasonable and just person to the irresistible conclusion that adultery has been committed. It was once said by a judge that to prove the offence by circumstantial evidence, it was necessary to establish a guilty affection between the parties, and opportunity to satisfy their desires. This may not be true in all cases, but in the main it is a reasonable basis of proof.

Just as the evidence of an eye-witness of an act of adultery is carefully examined, so is the evidence of one of the parties to the act. Whether that evidence is given in open court, or whether it is evidence of a confession, it is carefully examined. This is especially so when the witness, or the person who confesses, is

a party to the marriage it is sought to dissolve. Bare evidence of this nature is sometimes accepted, though it is more usual to call for corroboration of some kind in material particulars. The evidence of a prostitute is rarely, if ever, accepted without strong corroboration.

Hotel Cases

A type of case that has given grounds for uneasiness in recent years is that in which adultery is alleged to have been committed at an hotel. Many cases of this nature have given rise to the suspicion that the evidence has been staged for the purpose of obtaining a divorce, and to conceal the true facts of the relations of the parties to the marriage to each other. Devices of this kind to obtain relief are against public policy and public morals. Consequently the judges make searching investigation into the evidence, and require the fullest possible proof of the facts before they will infer that adultery has in fact been committed. The restrictions on the newspaper publication of the details of the evidence given in divorce cases have given rise to the popular belief, that the mere production of an hotel bill relating to the stay of two persons of the opposite sex at an hotel, establishes sufficient evidence of adultery to obtain a divorce. Nothing could be further from the truth. A record of a visit to an hotel carries little or no inference that adultery has been committed.

An examination of successful suits of this nature goes to show that evidence on the following lines is the minimum from which an inference of adultery will be drawn,—(1) that the husband or wife of the petitioner engaged a room at an hotel, being accompanied by, or joined later by a person of the opposite sex. This is generally established by the production of the hotel register containing the signatures of the visitors, or by the oral evidence of the servant of the hotel who received them. (2) that the persons who engaged the room actually occupied it. This may be proved by the evidence of the chambermaid, or other servant of the hotel who attended on them. This evidence must show that they were seen together in bed, or that they spent the night, or a great part of it, together in the bedroom. (3) that one of the persons who occupied the room was the spouse of the petitioner. This may be established by the identification of a photograph by the witness and the petitioner: by visual identification of such person by both the witness and the petitioner at some later date: or by the identification by the petitioner of the signature in the hotel register as that of his or her spouse, provided that a witness can swear that the person who signed

the register was the person who occupied the room. (4) when the identity of the other party to the adultery is unknown or cannot be established, that such party was *not* the petitioner. This evidence usually takes the form of the petitioner being identified by the witness as not being the person who occupied the room on the night in question.

Evidence on these lines is the minimum that will be accepted. It may be corroborated by evidence of guilty affection between the parties, or of close association in suspicious circumstances. But this latter evidence has only corroborative value. The principle followed by the court in granting or refusing a decree, is that, where evidence which is tendered in good faith clearly points to adultery in all usual circumstances, it is the duty of the court to act on it.[1]

The rule in Russell v. Russell

Difficulties often arise when it is sought to establish adultery by proof of the birth of a child to a wife, which child must have been conceived at a time when the husband and wife could not have had access to each other. There is an old rule of evidence that neither of the parties to a marriage may state that they did not have intercourse, or did not have the opportunity for intercourse after the marriage, at a time when a child born to the wife would have been conceived, if the object, or the remotest possible result of that evidence would be to bastardize the child. It was held by the House of Lords in the sensational *Russell Case*,[2] that the rule applied in all its strictness to a suit for divorce. The result is that a husband may not prove the adultery of his wife by *his* evidence that he was away from her at the time at which the child which was born to her was conceived. The rule is absolute, and even if the husband were out of the country at the material time, he may not give evidence of that fact.

Exceptions to the rule

As with all restrictive rules of law, the prohibition is construed very strictly. Consequently, there are a number of important exceptions to it. It does not apply to the birth of a stillborn child, nor to a miscarriage. In the former case, the child had no separate existence, and in the latter, there was no child, merely a foetus. It does not bar a confession by the wife of adultery at the material time, provided the words of the confession do not imply the bastardization of the child. But it does apply if the

[1] Woolf *v.* Woolf (1931), P.134 (C.A.)
[2] Russell *v.* Russell (1924) A.C. 687.

parties were separated at the material time, even though the separation was under a decree of judicial separation, or a separation order of a magistrate's court. In those circumstances, the only evidence that the husband can give is of the date and fact of the making of the decree or order. He may not state that it was still in force and obeyed at the material date.

The rule is confined to the evidence of a party to the marriage. It therefore does not prevent evidence of non-access being given by some other person, and it is only by such evidence that the fact of non-access can be proved. If the husband were out of the country at the time of the conception of the child, or if it were otherwise impossible for him to have had access to his wife, that fact must be proved by some person other than himself. Immediately it has been so proved, the husband is free from the restrictions of the rule and may give whatever evidence he chooses.

The period of gestation of a child may have a great bearing on the rule. The normal period is 275 days, but it has been held that it can continue for so long as 331 days.[1] It is therefore important to establish a long period of non-access to cover the possibility of an extended period of gestation. When the birth of the child has been premature, that fact must be proved by the evidence of the medical attendant present at the birth. Any evidence of non-access must have relation to the fact of the shortened period of gestation.

Venereal disease

Adultery is sometimes proved by the fact that one of the parties to the marriage is suffering from a venereal disease. The disease must have been contracted since the date of the marriage, and it must be established that it was not contracted from the petitioner.

Doctors have no privilege as to communications made to them by their patients, nor as to the nature of the malady from which they are suffering. This is so even if the doctors are on the staff of a state supported clinic under the national scheme for the treatment of venereal diseases, which promises secrecy.[2] A doctor may therefore be subpoena'd to give evidence that his patient is suffering from a venereal disease.

(When a spouse is suffering from a venereal disease in a communicable form at the date of the marriage, the appropriate remedy is a petition for nullity of marriage on that ground (*infra*, p. 36).)

[1] Gaskill *v.* Gaskill (1921) P. 425.
[2] Garner *v.* Garner (1920) 36 T.L.R. 196.

Desertion may arise out of such a variety of circumstances that it would be foolish to attempt to give a comprehensive definition of the offence. The conclusion that one spouse has deserted the other can only be arrived at after an examination of the facts of each particular case, and of the circumstances and mode of life of the parties. In general terms, the offence can be defined as the wilful absenting by one spouse from the society of the other, in spite of the wishes of that other.

The choice and situation of the matrimonial home is for the husband to decide,[1] but he must make his decision with due regard to his position in life. The choice must therefore be a reasonable one. If it be unreasonable, or made out of spite, the refusal of his wife to live with him does not carry the inference that she has deserted him.

Desertion must be without cause

Desertion must be without cause, which amounts to there being no reasonable excuse for it. What justifies one party leaving the other is dependent to a great extent upon circumstances. A man whose work calls for his living away from home, cannot be held to have deserted his wife. Similarly there cannot be desertion when the parties are separated through illness. But there can be desertion even though the parties live under the same roof, for it has been held that where a husband lived in a separate part of the house and withdrew himself entirely from his wife's company, he had deserted her. The fact that he paid her a proper and generous allowance did not affect the matter, for his wife was entitled to his society, and to the protection that his name and home gave her.

The following circumstances have been held to be reasonable cause for one party to leave the other,—when one spouse has confessed to having committed adultery; when a wife has brought an unfounded charge of a gross character against her husband; when a wife has permitted indecent liberties at the hands of another man; when the conduct of the wife has been such as to justify the inference that she has committed adultery, even though the offence cannot be proved; when the extravagance of a wife has been such as to affect the financial position and prospects of her husband. A wife has been held to have had reasonable excuse for leaving her husband, when she discovers an adulterous association with another woman whom he refuses to give up; when

[1] Mansey *v.* Mansey (1940) 84 Sol. J. 370.

her husband brought his mistress to live in his house; when he refused to discharge a servant with whom he was committing adultery; when he ordered his wife to leave the house, and she did so out of fear of him.

It does not necessarily follow that the deserting party is the one who leaves the matrimonial home. It may well be that the one who remains in the home is the deserting party, for his conduct may have made it impossible for the other party to continue cohabitation. A person must take the consequences of the acts that he commits, and if they be of such a nature as to make it impossible for a self-respecting spouse to live with him, he is, in law, guilty of desertion. "There is no substantial difference between the case of a husband who intends to put an end to a state of cohabitation, and does so by leaving his wife, and that of a husband who, with the like intent, obliges his wife to separate from him."[1]

It is possible that there may be desertion even though the parties to the marriage have never cohabited, for the offence is not so much a withdrawal from a place, as from a state of things. So that where a husband and wife parted immediately after the marriage ceremony, and never lived together afterwards, the husband was held to have deserted his wife, when she proved that she was always willing to cohabit with him but that he had consistently refused to make a home for her.

Desertion must be voluntary

Desertion must be the voluntary act of one of the parties to the marriage. It cannot arise when the parties are living apart through circumstances beyond their control, as when the husband is compelled to live away from home for business reasons, or when one of the parties is in prison. Separations of this kind are involuntary. But an involuntary separation may become desertion, if, at any time during which the parties are separated, one of them expresses, or shows an intention of not returning to the other when an opportunity to do so arises. In such a case, desertion commences from the moment the intention was expressed or otherwise showed itself. It would be inferred when a husband whose business called for his residence abroad, ceased to correspond with his wife and went to live with another woman. It would then be deemed to have commenced on the date upon which he ceased to write to his wife, or upon which he commenced his adulterous association with the other woman.

When desertion has taken place, and afterwards circumstances make it impossible for the parties to come together again, the

[1] Sickert *v.* Sickert (1899) P. 278. per Gorell Barnes, J. at p. 280.

desertion continues, unless the deserting party expresses a genuine intention to return to cohabitation at the first opportunity. A situation of this kind would arise when a husband who has already deserted his wife, is imprisoned, or leaves the country on business. The desertion having begun before the separation became involuntary, continues until there is a sincere expression of an intention to return and resume cohabitation as soon as it becomes possible. But this is not so when the desertion becomes involuntary through the insanity of the deserting party. An insane person is incapable of the exercise of any judgment, and so cannot make a change of mind or heart, and elect to resume cohabitation. The period of desertion therefore comes to an end when the deserting party becomes of unsound mind.

Effect of an agreement to separate

Where there is an agreement of any kind between the parties that they shall separate, there can be no desertion. It is immaterial whether the agreement is a verbal one, or whether it is contained in a deed or other written document. It may even be inferred from the conduct of the parties. So long as the terms of the agreement are carried out, there can be no desertion. But if either party repudiates the agreement, a period of desertion commences from the date of the repudiation. Repudiation may be inferred from a consistent neglect to carry out the terms of the agreement, as when a husband neglects, over a long period of time, to pay the maintenance provided by it.

A bare agreement to pay an allowance to a deserted wife does not in itself preclude desertion by the husband. It may well be that the wife cannot help herself, and that she is bound to accept the allowance in order to live. In such cases, the facts alone can determine whether the acceptance of an allowance amounts to a consent to the separation.

A tacit agreement to separate is as much an agreement as one that is verbal or written. Where a husband, who had knowledge of his wife's intention to leave him, calmly discussed the division of the household goods, and did not even express any regret at the separation that was about to take place, let alone make any effort to persuade his wife to change her mind, it was held that he had tacitly agreed to the separation, and therefore could not claim that his wife had deserted him.

Effect of a decree of judicial separation, or of a separation order

There can be no desertion if a decree of judicial separation has been pronounced, for the parties are living apart in consequence

of the decree. The party at whose instance it was made, has shown that he or she is unwilling to continue to cohabit with the other party. If there had been desertion before the making of the decree, it came to an end with its pronouncement.

The position with regard to separation orders made on the ground of desertion in a magistrate's court is dependent upon the terms of the order. If it contain the clause which declares that the parties are not bound to cohabit with each other, it is equivalent to a decree of judicial separation. There can therefore be no desertion so long as the order is in that form. If the order does not contain that clause, the desertion upon which the order was founded continues to run after the making of the order.

When an order contains the non-cohabitation clause, and it is desired to take proceedings for divorce on the ground of desertion, application must be made to the magistrates who granted it, for its amendment by the deletion of the clause. When this has been done, the period of desertion begins to run again. The period of desertion upon proof of which the order was made, may be aggregated with that following the amendment of the order, to make up the three years necessary to support a petition for divorce.

Three years' desertion

There must have been no cohabitation between the parties for at least the three years immediately preceding the day upon which the petition for divorce is presented. Any return to cohabitation during that period brings the desertion to an end, and a further uninterrupted period of desertion for three years must again run before a petition for divorce may be presented.

At all times during a period of desertion, the deserted party must be prepared to receive any approaches towards reconciliation. If the deserting party wishes to meet the other with a view to discussing and settling their differences, it is the duty of the deserted party to arrange an opportunity for so doing. If this be not done, the desertion comes to an end,[1] the principle being that the party who was in the wrong in the first place, is always at liberty to take steps to mend that wrong.

In order to be an effective interruption of the period of three years, any return to cohabitation must be genuine and sincere. A return of one night might be sufficient, though it would not be if it could be established that there was not the slightest intention of a sincere and permanent return to cohabitation. When there is a return to cohabitation for a very short period, the court must be satisfied of its genuineness, and that it is not merely a device

[1] Joseph *v.* Joseph (1939) 55 T.L.R. 951.

to prevent the desertion continuing for three years. If it be for that purpose, the court will hold that the desertion still continued notwithstanding the return.

Evidence in proof of desertion

The nature of the evidence necessary to establish desertion is entirely dependent upon the facts of the particular case. These are examined on their merits, and in relation to the circumstances under which the parties lived together. Owing to the elasticity of the offence, it is impossible to lay down definite rules.

CRUELTY

Since cruelty can take so many different forms, it is not possible to give a comprehensive definition of the offence. The nearest approach to a judicial definition is, that "it is conduct of such a character as to cause danger to life, limb, or health, bodily or mental, or such as to give rise to a reasonable apprehension of such danger".[1] This definition allows of the division of cruelty into two forms,—(1) actual cruelty manifesting itself by blows or other physical ill-usage, and (2) constructive cruelty, which would be a course of conduct resulting in danger to the health of the person against whom it is directed. In either form of the offence, it must be evidenced by acts or conduct wilfully and unjustifiably committed, having the effect of inflicting pain or misery, and causing injury to health, or a reasonable apprehension of such injury.[2]

Incompatibility of temperament does not amount to cruelty, and relief on that ground is unknown to the laws of England or Wales. It may well be that the character of either or both of the parties to the marriage has developed in such a way as to make it impossible for them to live happily together. But that does not constitute cruelty, for that offence presupposes acts, or a course of conduct detrimental to the health of one of the parties to the marriage.

Evidence in proof of cruelty

As with desertion, the facts of each case must be carefully examined before cruelty is established. The circumstances under which the parties live, their social status, and their marital relations, each have a bearing on the matter. If the cruelty takes the form of blows or ill-usage of that kind, it must be shown that they were a part of a series of acts, and not the result of a sudden burst of passion resulting from the strained relations of the parties

[1] Russell *v.* Russell (1897) A.C. 395, at p. 457.
[2] Horton *v.* Horton (1940) 84 Sol. J. 503.

at the moment of the assault. An isolated instance of a blow struck in temper cannot be held to amount to cruelty, unless it was coupled with other incidents likely to affect the health of the party suffering them. Where there is no evidence of blows, the conduct of which complaint is made must be persistent, and have the effect of adversely affecting the health of the party suffering it.

When an order has been obtained in a magistrate's court on the ground of persistent cruelty, it is not always necessary to produce evidence in proof of the cruelty when application is made for a divorce on the same grounds. The production of the order, supported by the evidence of the petitioner, may be accepted by the judge of the divorce court as sufficient proof.[1] It must be noted that an order may only be made in a magistrate's court on proof of *persistent* cruelty. The measure of proof in a magistrate's court is therefore greater than that called for in the divorce court, though the nature of the acts, or of the course of conduct complained of, is the same.

INSANITY

To provide a ground for divorce, insanity must be *incurable* unsoundness of mind, for which the patient must have been under care and treatment for a period of at least *five years* immediately preceding the presentation of the petition for divorce.

The best evidence that can be obtained must be placed before the court. This is usually that of the medical attendant who has personal knowledge of the patient, obtained by regular attendance on him over a considerable period of time. It must be the expression of an unqualified belief in the incurable unsoundness of mind of the patient, and the reasons upon which the relief is based must be given.

The medical history of the patient must be disclosed to the court, for it is corroborative of the medical evidence. For this purpose, the Minister of Health has authorized the Board of Control to grant facilities for *bona fide* applicants to obtain copies of reception documents and of statutory medical reports. The file of the Board of Control relating to the patient should be before the court on the hearing of the petition.

Once the court is satisfied that the patient is incurable of unsound mind, the degree or extent of the unsoundness of mind is immaterial, except so far as it is necessary to prove that the patient has been under continuous care and treatment for a period of at least five years immediately preceding the presentation of the petition.

[1] Matrimonial Causes Act, 1937, S.6. (2).

Care and treatment

Care and treatment must be detention under an order or inquisition under the Lunacy and Mental Treatment Acts, 1890 to 1930; any order or warrant under the Army Act, the Air Force Act, the Naval Discipline Act, the Naval Enlistment Act, 1884, or the Yarmouth Naval Hospital Act, 1931, or as detention as a criminal lunatic, or in pursuance of an order under the Criminal Lunatics Act, 1884. Treatment as a voluntary patient under the Mental Treatment Act, 1930, if it be treatment following without any interval a period of such detention, is care and treatment within the meaning of the Act. No other form of care and treatment will be sufficient.[1]

Five years' detention

There must have been a period of at least five years' unbroken detention in a mental hospital. If, during that period, a patient is released on trial, the period of detention is not broken. Similarly, where a patient has been permitted to go to a seaside home under the control of the mental authority, the period away from the mental hospital is not a break in the period of detention. Such a trial or holiday period may therefore be counted as forming part of the necessary period of five years' detention.

Protection of the interests of the patient

Since a person of unsound mind is incapable of protecting himself, or of placing his case before the court, he must be represented by a guardian appointed for that purpose. This guardian should be his or her nearest of kin, though preferably not the person who has been appointed the receiver of his estate. If any order affecting the person of unsound mind has been made by the Management and Administration Department of the Supreme Court of Judicature, the person proposed as guardian for the purpose of the divorce proceedings must be approved by that department.

Where there is no person competent and willing to act as guardian, the Official Solicitor of the Supreme Court should be approached with a view to his being appointed.

Whether the guardian appointed is represented at the hearing of the petition, or whether he attends the hearing of the petition in person, he must be prepared to place the result of the enquiries he has made before the court. These enquiries should have been directed to the ascertainment of—

[1] Matrimonial Causes Act, 1937, S.3.

1. whether there is any evidence to show that the mental illness of the person of unsound mind arose from any act of the petitioner.
2. whether the conduct of the petitioner has been such as to call for the exercise of the discretion of the court (*post*, Chap. II, p. 49), or would entitle the respondent to make cross charges (*post*, Chap. II, p. 47).
3. the medical history of the person of unsound mind obtained from the mental hospital in which he is detained, and from the Board of Control.
4. the means of the petitioner, and how the patient has been maintained during his detention.
5. whether the opinion of an independent medical practitioner has been obtained on the subject of the mental condition of the patient.

Maintenance of the patient

Where a patient has been maintained wholly or in part by a local authority, that authority must be notified of the proceedings, and of the date of the hearing. There is power in the court to order that the petitioner shall make a proper provision for the maintenance of the person of unsound mind, and any decree made may be conditional on this being done.

RAPE, SODOMY, OR BESTIALITY

When any of these unnatural offences are charged, the actual act must be proved. An attempt at the commission of one of these acts is not sufficient to obtain a divorce, though, since such an attempt may amount to cruelty, a divorce may be obtained on that ground.

Where there has been a criminal conviction for one of these offences, the certificate of conviction is merely evidence of the conviction, and not of the commission of the offence. The offence must therefore be again proved, and evidence, similar to that adduced in the criminal proceedings, must be presented to the divorce court. When sodomy between the parties to the marriage is alleged, it must be proved with the same strictness as would be required in criminal proceedings, and corroboration of the evidence may be required.

In dealing with unnatural offences, it is interesting to note that although homosexual acts between males are a crime, similar acts between females are not so. Lesbianism is therefore no crime, nor a matrimonial offence, though its practice may amount to cruelty, upon proof of which a divorce may be

obtained. It may be a good answer to a charge of desertion, or may be pleaded as a bar to any relief that may be sought.

PRESUMPTION OF DEATH AND DISSOLUTION OF MARRIAGE

If it can be established that there are reasonable grounds for supposing that a party to a marriage is dead, the other party may obtain a decree presuming that such person is dead, and dissolving the marriage.[1]

The purpose of this provision is to afford relief to those unfortunate persons who are in the invidious position of not knowing whether they are widows or widowers, or whether they are still married. Formerly, they re-married at their own risk. If the missing spouse re-appeared, the second marriage was not only invalid, but bigamous, with the result that any issue of it would be bastardized. Under the criminal law, proceedings for the crime of bigamy could be taken, though it would be a good defence if the missing spouse had not been heard of during the seven years preceding the bigamous marriage.

Evidence

The measure of evidence to obtain a decree of presumption of death and of dissolution of the marriage is dependent upon the length of time for which the missing spouse has not been heard of. If that period be seven years or more, it is merely necessary for the petitioner to establish that the missing spouse has been absent for that period, and that during it, he or she had no reason to believe that the missing person was alive. Unless there is evidence to the contrary, proof of these facts is sufficient evidence to presume death.[2] If the period be less than seven years, the death of the missing spouse will not be presumed, nor will the marriage be dissolved, unless there are reasonable grounds for believing that he or she is dead. The age of the missing spouse, the state of his or her health at the time of the disappearance, the circumstances of the disappearance, and any reasons there may be, or can be deduced, for it, are all factors that must be taken into account before a decree will be made.

Re-appearance of missing spouse after decree

If the missing spouse re-appears before the decree *nisi* has been made absolute, the decree is ineffective. It cannot be made absolute, and application must be made for its rescission. But if

[1] Matrimonial Causes Act, 1937, S.8 (1).
[2] Matrimonial Causes Act, 1937, S.8 (2).

a decree absolute has been pronounced, it is fully effective so far as it dissolves the marriage, and the marriage stands dissolved.

It is important to note that a decree of presumption of death is only effective for the dissolution of the marriage. It cannot be separated from that relief, and is therefore ineffective to support any other claim which is dependent upon the death of the missing spouse. For all other purposes, an order presuming death must be obtained from the Court of Chancery.

JUDICIAL SEPARATION

A decree of judicial separation may be granted on any of the grounds upon which a decree of divorce may be granted. (*Supra*, p. 17.) It may also be granted upon the ground of refusal to comply with a decree of restitution of conjugal rights.[1]

The remedy of judicial separation is a very old one, having been granted by the ecclesiastical courts under the name of a divorce *a mensa et a thoro*,—a divorce from bed and board. Its effect is to free the party who obtains it from the obligation to cohabit with the other party. If the petitioner be the wife, there is a further effect on property which she may acquire after the decree was granted. As regards such property, she is deemed to be a single woman so long as the decree remains in force. The result is that if she die without having made a will, it passes as though she had died a widow. If the property be subject to a restraint upon anticipation, the restraint is lifted and is inoperative so long as she lives apart from her husband under the decree.

But the decree has no effect upon the property of the husband, whether he be the petitioner or the respondent. If he die without having made a will, his wife is entitled to share in it, despite the fact that she was judicially separated from him at the date of his death.

The same effects follow from a separation or maintenance order made in a magistrate's court, *provided that the order contains the non-cohabitation clause*, which is a clause expressly stating that the complainant is not bound to cohabit with the defendant.

Whether relief should be sought by way of proceedings for judicial separation, or by way of a magistrate's order, usually depends upon the financial circumstances of the parties. Proceedings for judicial separation are more expensive than those for a separation or maintenance order, but the amount of alimony

[1] Supreme Court of Judicature (Consolidation) Act, 1925, as amended by the Matrimonial Causes Act, 1937, S.5.

or maintenance that can be ordered to be paid under the former proceedings is unlimited. Under the latter proceedings no order may be made in excess of £2 per week.

Since a divorce may be obtained on most of the grounds that would justify a decree of judicial separation, applications for the latter class of relief are becoming more rare. They are generally made by persons who have religious objections to divorce, or who will not free the other party to the marriage for reasons of jealousy, spite, and the like. Even if the judge who hears a petition for judicial separation is of the opinion that the parties would be better off if they were divorced, he has no power to substitute a decree of divorce for that of judicial separation unless the petitioner agrees.

Jurisdiction

In order that the court may have jurisdiction to hear a petition for judicial separation, the parties must either have been domiciled in England or Wales at the date of the institution of the proceedings, or have been resident in England or Wales at the date of the commencement of the proceedings. As to residence, it is sufficient if the husband alone has been resident for a long period immediately before the presentation of the petition.

The only exception to these rules is where a wife has been deserted by her husband, or he has been deported from the United Kingdom, and immediately before the desertion or deportation, he was domiciled in England or Wales. In such circumstances, the wife may take proceedings for judicial separation even though the husband has changed his domicile since the desertion or deportation.[1]

Evidence

The same measure of evidence must be adduced to obtain a decree of judicial separation as to obtain a divorce. (*Supra*, p. 18–30.) Where a judicial separation is sought on the ground of failure to comply with a decree of restitution of conjugal rights, it is sufficient merely to prove the service of the decree and disobedience thereto.

Where a judicial separation has been granted, or a separation or maintenance order has been made in a magistrate's court on grounds that would have been sufficient to obtain a divorce, a divorce may be applied for at a later date on the same facts. The divorce court may accept the decree or order as sufficient proof

[1] Matrimonial Causes Act, 1937, S.13.

of the charges made. This obviates the expense of calling witnesses to prove the same facts again, but the evidence of the petitioner is always required.[1]

When a judicial separation has been granted, or a separation or maintenance order made, on the grounds of desertion, and application is made for divorce on the same facts, the period of desertion immediately preceding the presentation of the petition for judicial separation or the application for the magistrate's order, is deemed in law immediately to precede the presentation of the petition for divorce.[2] This provision offers no difficulties where a judicial separation has been granted, but complications may arise out of a separation or maintenance order, and the position has to be examined carefully.

A judicial separation on the ground of desertion can only be granted on proof of at least three years uninterrupted desertion immediately preceding the presentation of the petition. For the purpose of divorce proceedings, this period can be carried forward, and is deemed to have occurred immediately before the presentation of the petition for divorce. The divorce may therefore be granted without further proof of the facts, other than the evidence of the petitioner.

But if the divorce proceedings be based on the grant of a separation or maintenance order, the situation may be different. There is no minimum period of desertion laid down for the grant of such an order. In the rare cases where an order has been made on proof of desertion for a period of at least three years, the position is the same as though a judicial separation had been granted. But if it were made, as is more common, on proof of desertion for less than three years, the presence or absence of a non-cohabitation clause in the order is a very material matter. If the clause be included in the order, desertion ceases to run, from the date of the order. It is not therefore possible to prove continuous desertion for the requisite period of three years. The remedy in such a case is to make application to the court that made the order, to have the clause struck out. When this has been done, desertion begins to run again, and this later desertion may be aggregated with that upon which the order was based, to make up the necessary three years. But if the non-cohabitation clause were not inserted in the order, the desertion continues to run. The period after the date of the order may therefore be added to that upon which the order was made, and so the period of three years may be made up. Strict proof of the desertion in

[1] Matrimonial Causes Act, 1937, S.6. (1).
[2] Matrimonial Causes Act, 1937, S.6. (3).

this latter period must of course be made, as the production of the order does not establish it.

NULLITY OF MARRIAGE

A decree of nullity of marriage declares that the ceremony of marriage which was solemnized, is absolutely null and void to all intents and purposes of the law. Its effect is that there is a complete cancellation of the marriage, and the parties to it are back in the position they would have been had the ceremony never taken place. Children born of such a marriage are illegitimate, except when the marriage was annulled on any ground provided by section 7 of the Matrimonial Causes Act, 1937. (*Infra*, p. 35.) This section expressly provides that issue born of the marriages to which it applies, shall be legitimate for all purposes.

Marriages that can be declared a nullity may be divided, in accordance with the facts that permit the annulment, into two classes,—void and voidable marriages.

Void Marriages

Void marriages are those which were an empty formality at the time of their celebration. No proceedings are necessary to declare them void, and the parties may re-marry without a formal declaration setting aside the previous ceremonies. The existence of any of the following circumstances brings a marriage within the category of void marriages,—bigamy; marriages celebrated on or after the 10th May, 1929, where either or both of the parties were below the age of sixteen years[1]; marriages between persons who are within the prohibited degrees of kinship[2]; where there has been lack of consent to the marriage. (Lack of consent may arise from mental incapacity, intoxication to such a degree as to render the ceremony incomprehensible, fraud, compulsion, or duress); a grave defect in the formalities of the marriage.

Although in this class of marriage a decree of annulment is not necessary, it is most desirable that one should be obtained for the purpose of record and the perpetuation of testimony. This is

[1] Age of Marriage Act, 1929. The position of a marriage entered into before that date is, that where either or both of the parties was below the age of seven years, it is completely void. If they were over the age of seven, but the husband was below the age of fourteen, or the wife below the age of twelve years, either of them may repudiate the marriage before they attain those respective ages. If they cohabit after attaining those ages, the marriage becomes valid and binding.

[2] These degrees are those set out in the Table of Affinity contained in the *Book of Common Prayer*, excepting the prohibitions against marriage with a deceased wife's sister or half sister, or a deceased brother's or half brother's widow.

particularly so when the marriage is void as being within the prohibited degrees, through lack of consent, or of the invalidity of the ceremony.

Voidable Marriages

Voidable marriages are those which may be declared null and void on proof of certain facts. They remain valid until declared invalid by a decree of a competent court.

Incapacity to consummate a marriage has, from time immemorial, rendered a marriage voidable. It has always been recognized, even by the most conservative religious bodies, as a valid reason for setting aside a marriage. The incapacity may arise from impotence, physical malformation, frigidity, or other sexual defect, which existed at the date of the marriage and has continued throughout its subsistence. If the incapacity arose since the date of the marriage, it does not afford any ground for relief. Sterility, or incapacity to bear a child is not incapacity to consummate the marriage. Whatever form the incapacity takes, the condition must be incurable, though a refusal to undergo treatment is taken as proof that it is incurable. In former times, incapacity to consummate would not be presumed unless there had been a testing period of at least three years. This rule does not now hold, and proceedings may be taken as soon as it is discovered.

In more recent years, Parliament has laid down further grounds upon proof of which a marriage may be voidable.[1]

These are,—

(a) that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate it.[2]

(b) that either party to the marriage was at the time of its solemnization of unsound mind, or a mental defective within the meaning of the Mental Deficiency Acts, 1913 to 1927,[3] or subject to recurrent fits of insanity or epilepsy.

[1] Matrimonial Causes Act, 1937, S.7.

[2] What amounts to a wilful refusal to consummate a marriage has not yet been defined. But it has been held that the insistence by a husband of the use of a rubber sheath as a contraceptive, or the practice of onanism by him, amounts to a wilful refusal to consummate the marriage.—Cowen (otherwise Smith) *v.* Cowen (1945) 61 T.L.R. 525.

[3] These are idiots, who are persons so defective mentally as to be unable to guard themselves against common physical dangers; imbeciles, who are persons so defective mentally as to be incapable of managing themselves or their affairs; feeble-minded persons, who are persons so mentally deficient as to require care, supervision or control, for their own protection or for the protection of other persons; and moral defectives, who are persons whose mental deficiency is coupled with strong vicious or criminal propensities, and so require supervision and control for the protection of others.

(c) that the respondent was at the time of the marriage suffering from a venereal disease in a *communicable* form.
(d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner.

The relief afforded under (b), (c), and (d), is conditional upon the court being satisfied that the petitioner, at the time of the marriage, was ignorant of the facts alleged; that the proceedings were instituted within one year of the date of the marriage; and that marital intercourse, with the consent of the petitioner, has not taken place since the discovery of the existence of the grounds for a decree.

Jurisdiction

The jurisdiction to make a decree of nullity of marriage has not yet been exhaustively defined, and there is a tendency to enlarge it. It is certain that there is jurisdiction when the parties are domiciled in England or Wales, or when the marriage was celebrated in England or Wales. It is probable that there is also jurisdiction where one of the parties is resident in England or Wales, but whether it extends to a decree on all the usual grounds is to a certain extent still in doubt.

Who may present a petition

Petitions for nullity of marriage present an exception to the general rule that only an innocent party may present a petition for relief in a matrimonial matter. Application for the annulment of a marriage may be made in some cases by either party to the marriage, and even sometimes by a person who is not a party to it.

Where the marriage is void, either party to it may present a petition, irrespective of whom is to blame. A petition may also be presented by any person who claims that he is adversely affected by the existence of the marriage. So that the father of one of the parties may present a petition to have the marriage annulled, as he is liable to be called upon to support his child, or to support any issue that may be born of the marriage. Similarly, any person whose claim to a title or property might be adversely affected by the birth of issue, may present a petition.

Where a marriage is only voidable, it is only the parties to it who may present a petition, for the matters of which complaint is made are personal to them. Whether the party who is in the wrong may do so, is dependent upon the grounds upon which it is sought to put the marriage aside. If the ground for relief be the incapacity of one of the parties to consummate the marriage,

and the innocent spouse has repudiated the marriage by withdrawal from cohabitation, the impotent spouse may present a petition. If the ground for relief be that one of the parties was, at the time of the marriage, of unsound mind, or a mental defective, or subject to recurrent fits of insanity or epilepsy, it is probable that such party may apply for relief. But where the ground is wilful refusal to consummate the marriage, venereal disease, or pregnancy by some other person, it is only the injured party who may present a petition.

Evidence

The evidence required to support a petition for nullity of marriage is dependent upon the nature of the charges made. In the case of void marriages, the facts that make them void must be strictly proved. If it be a bigamous marriage, the same evidence as would be required in a criminal prosecution for bigamy is necessary; if it be a marriage within the prohibited degrees, strict proof of the relationship is necessary; if one or both of the parties were under age, the dates of their birth must be strictly proved.

In the case of voidable marriages where the offence is incapacity to consummate, or a wilful refusal to do so, in addition to the evidence of the petitioner and his or her witnesses, medical evidence is required. The matter is referred to medical inspectors[1] appointed by the court for their opinion on the physical condition of each of the parties to be obtained. Before the case is set down for hearing, two inspectors are appointed from the rota of medical practitioners approved for the purpose, and an order is served on each of the parties calling upon them to attend to be medically examined. There is no penalty for disobedience to this order, though it is in the interest of the petitioner at least to attend. Failure to do so would tell against the truth of the charges made.

The duty of the inspectors with regard to the wife is to ascertain whether or not she is a virgin. If she does not show all the usual signs of virginity, there is a presumption that the marriage has been consummated. This presumption is of course not conclusive, and may be rebutted on proof that she lost her virginity by intercourse with a man other than her husband, or by some accidental means. The duties of the inspectors with regard to the husband is to ascertain whether he is normally formed, and whether he is apparently capable of performing the act of generation.

The inspectors report on the conditions that they find, and

[1] It is a recommendation of the Denning Committee that where a party has been examined by his or her medical advisers, examination by inspectors should be abolished.

generally make no comment on other matters that may arise, except in answer to specific enquiries that may be made of them by the judge, or by the counsel of either of the parties.

Whenever evidence of sexual incapacity is given at the hearing of a petition, the court sits *in camera*, that is to say, members of the general public are excluded, and the evidence is given in the presence of the judge, court officials, the parties and their legal advisers, alone. This is done to avoid the natural embarrassment that is felt by normal people in speaking of their sexual experiences.

RESTITUTION OF CONJUGAL RIGHTS

A degree of restitution of conjugal rights is one whereby the court orders a spouse who has withdrawn from cohabitation without reasonable cause or excuse, to return to cohabitation. Although by the terms of the decree, the offending spouse is ordered to return and to render conjugal rights, a mere withdrawal from, or a cessation of sexual intercourse is not a ground upon which a decree may be obtained. What amounts to reasonable cause or lawful excuse is the same as would justify a spouse in leaving the other party to the marriage. (*Supra*, p. 22.)

In former times, disobedience to a decree of restitution of conjugal rights was punishable as a contempt of the court, but today there is no punishment that it would be practicable to impose. The result is that the person in whose favour the decree was made, has no remedy to enforce obedience if the decree is ignored. The successful party may not molest the other, nor interfere with his or her liberty by forcible detention until the decree is obeyed.[1] A decree of restitution of conjugal rights is therefore of much less value than it was in former times, and consequently applications for this remedy are comparatively rare. Before the Matrimonial Causes Act, 1923, applications were common, for disobedience to a decree amounted to desertion. This, coupled with proof of adultery, afforded grounds upon which a wife could obtain a decree of divorce. The Act of 1923 placed both husbands and wives on an equal footing as regards grounds for divorce, and the necessity to couple some other matrimonial offence with adultery was no longer necessary.

The value of a decree of restitution of conjugal rights today lies almost wholly in the financial advantages that can be

[1] Reg. *v.* Jackson (1891) I Q.B. 671, where the husband abducted his wife when she was leaving church, and imprisoned her in his house in an endeavour to compel her to render conjugal rights. A writ of *habeas corpus* was applied for and obtained.

obtained from it. A wife who has been deserted by her husband may not be in a position to maintain herself or her children during the three years continuous desertion which must necessarily pass before she can apply for a divorce. She may of course apply for maintenance in a magistrate's court, but as such courts are limited to £2 a week in the amount that may be ordered, the sum ordered to be paid may be insufficient to support her in the manner in which she has been accustomed, or which is justified by her husband's financial position. Proceedings for restitution of conjugal rights is the appropriate remedy in such a case. Pending the hearing of the petition, an order for the payment of alimony may be obtained, and on non-compliance with the decree that may be made, maintenance in the form technically known as periodical payments or permanent alimony may be obtained. (*Post*, Chap. v, pp. 75, 88, 91.)

In addition to the financial advantages that may be obtained, non-compliance to a decree of restitution of conjugal rights amounts to desertion sufficient to support a petition for judicial separation. There is little advantage in this, for no real benefit can be obtained by a judicial separation that cannot be obtained by the decree for restitution of conjugal rights already obtained.

DAMAGES

Who may claim

Damages may only be claimed by a husband from the man with whom it is alleged his wife has committed adultery. They cannot be claimed by a wife from the woman with whom it is alleged her husband has committed adultery.

A similar form of action is available to either a husband or a wife in the courts of common law. This is an action for damages arising out of the enticement of a husband or a wife from the other party to the marriage, and it must be brought in the King's Bench Division of the High Court of Justice.

If an action for enticement at common law and a suit for damages in the Divorce Court be brought at the same time, the enticement proceedings will be stayed until those in the Divorce Court are terminated. If the latter result in an award of damages, the action for enticement cannot be proceeded with unless there are grave matters which were not, or could not have been dealt with by the Divorce Court. Similarly, where damages have been obtained in an enticement action brought before the divorce proceedings are commenced, the Divorce Court will not entertain a claim for damages based on the same facts.

When and how application is made

Normally, a claim for damages is made as part of the proceedings for a divorce or judicial separation. It may not be made when any other form of relief is sought. But a petition for damages alone may be presented, and it need not have reference to proceedings for divorce or judicial separation. It may even be presented after the marriage has been dissolved, or after the death of the wife. If the wife dies in the course of proceedings for divorce or judicial separation in which damages are claimed, they come to an end except so far as the claim for damages. That may still continue.

As a claim for damages is a personal action, it comes to an end on the death of the husband or of the co-respondent before the matter is determined. It cannot be continued by or against the personal representative of either of them.

Assessment of damages

As a general rule, the amount of damages to be paid is assessed by a jury, though an order may be obtained dispensing with a jury and so leaving their assessment to the judge. Whether the assessment is made by a jury or by a judge, the same principles apply and the same matters are taken into consideration.

It does not follow that because damages are claimed that any award will be made. It is entirely within the discretion of a jury or of a judge to refuse to award any damages at all, even if the charges of adultery are proved. If no damages are awarded, or if only nominal damages are given, there is no right of appeal to a higher court.

Circumstances affecting damages

In every case, actual damage of some form or another must be proved. It is generally thought that before a claim for damages may be successful, the husband must prove that the co-respondent knew that the woman with whom he was committing adultery was a married woman. But this is not entirely free from doubt. Some judges have held that it is necessary that it should be so proved; others, that the question is immaterial, as a man who commits adultery does so taking the risk that the woman is a married woman; others, that the fact of knowledge is an aggravation of the offence, but that absence of knowledge is not a bar to the award of damages. But it is well-established law that where a co-respondent did not know that the woman was a married woman when he first committed adultery, but continued to commit adultery after he had knowledge of that fact, damages may be awarded against him.

The conduct of the husband is one of the most important factors in the consideration of a claim for damages. It must be above suspicion, and must not have been the cause of the original estrangement from his wife. If he himself has been guilty of adultery, or if any conduct of his would have entitled his wife to take proceedings against him, the chances of obtaining damages are remote. If he has neglected his wife, or has had little consideration for her feelings and comfort, it will be difficult for him to establish that he has in fact suffered any damage.

Damages are in the nature of compensation for the disruption of the home. They are not awarded as a punishment, nor as a deterrent to other people; neither are they vindictive. The fact that a co-respondent is a wealthy man is immaterial, unless it can be shown that he deliberately used his wealth as a means to seduce the woman. But his conduct is very material. If he attained his ends by treachery or by force, or under the guise of family friendship, or took advantage of the unavoidable absences of the husband, these matters may be legitimately considered in assessing the amount of damages to be paid.

In proving actual damage, regard may be had to the main aspects of married life. A good wife has a certain pecuniary value to her husband, and her abilities as a housekeeper and as a mother have a financial effect on the home. Some wives have means of their own which are of assistance in supporting the family in the station of life in which they live; others have commercial abilities which may be of assistance in the husband's business. The loss of any of these aids have a financial effect on the future of the family. On the other hand, if they are lacking, or if the wife is of the thriftless, shiftless, irresponsible type, there is little financial damage suffered.

But the greatest value of a wife is as the partner and companion of her husband. A happy and contented home is of rare and priceless value, and he who is responsible for breaking it up, inflicts damage for which no amount of money is adequate compensation. Heavy damages may therefore be awarded on these grounds. Where the married life of the parties has been unhappy, or where the conduct of the wife has been marked by wantonness or disloyalty, or she is of the type that yields lightly to a man, there is a corresponding deterioration of her value.

Disposal of damages

When damages are awarded, they must be paid into court, or in such manner as may be directed. They are not payable as of right to the husband, and their disposal is for a judge to direct.

A special application must be made for this purpose, at the hearing of which the circumstances of all the parties that may be affected, are considered. On the facts of the case, unconditional payment may be made to the husband, or if there be children, and their well-being calls for it, an allocation of part, or even of the whole may be made for their benefit. Where a wife has been abandoned by the co-respondent, and she is left without any means of support, if her conduct has been merely that of a woman who has erred, and there is no other reflection upon her chastity or conduct, it may even be ordered that the damages be invested to provide her with an income so long as she remains single and lives a chaste life. There is no limit set to the discretion of the judge, and unless the circumstances are most exceptional, there is no appeal from the manner in which he has exercised his discretion.

CHAPTER II

CONCERNING SERVICE, APPEARANCE, AND DEFENCE

A PETITION MUST END with a prayer which sets out in concise language the exact nature of the relief that is sought. It is not permissible to ask for relief in the alternative, so a petitioner may not ask that the marriage be dissolved, *or* that the parties be judicially separated. If any other orders be desired, a request for them must be made in the prayer. These would be orders for costs, damages, custody and maintenance of children or alimony pending the suit. If the petitioner has been guilty of adultery, it must be prayed that the court will exercise its discretion, and grant a decree notwithstanding such adultery. The petition is complete and ready for presentation when it is signed, and notices addressed to the persons mentioned in it are endorsed.

After the petition has been filed, copies of it bearing the seal of the court must be obtained for service on all parties against whom charges are made. The position of these parties in the proceedings is determined by the liabilities they have incurred, and in accordance with these liabilities certain descriptions are given to them. As reference will be made to these descriptions, an explanation of them is necessary.

The party who seeks relief and files the petition is called the PETITIONER. The other party to the marriage, and against whom the petition is presented, is called the RESPONDENT. If it be the

husband, he is liable to be called upon to pay the costs of the proceedings, and this is so whether the prayer to the petition asks that that be done or not; if it be the wife, she can only be ordered to pay the costs of the proceedings if the prayer to the petition asks that that be done. Such an order is of little value unless she has means of her own out of which she can pay them.

The name given to a known person with whom it is alleged that adultery has been committed is dependent upon the sex of that person. If male, he is called the CO-RESPONDENT; if female, she is generally called the NAMED WOMAN. But if it be claimed that she has means of her own, and the prayer to the petition asks that she be ordered to pay the costs of the proceedings, she is called the SECOND RESPONDENT. Where a named woman enters an appearance in the proceedings, she becomes an INTERVENER, and is so called. A co-respondent or intervener may be ordered to pay the costs of the proceedings whether the prayer to the petition asks that that be done or not.

Notices to appear

The notices endorsed on the petition, and addressed to the persons mentioned in it, relate to their right to enter an appearance in the proceedings. There are two forms of notice,—the one is addressed to the other party to the marriage, and to any persons mentioned in the petition who are liable to be condemned in costs without any further steps being taken, i.e., co-respondents, and named women whom it is asked shall be ordered to pay the costs of the proceedings. This form of notice states that the person to whom it is addressed is "*required to enter an appearance*" within a stated time. Although the notice is peremptory in its terms, there is no penalty suffered if it be ignored, and no appearance entered.

The other form of notice is addressed to the persons mentioned in the petition who have no financial liabilities unless they enter an appearance, and so intervene in the suit. It states that he or she is "*entitled . . . to apply upon summons for leave*[1] *to enter an appearance . . . and to intervene in the cause*", within a stated time. Appearance can only be entered on production of an order giving leave to do so.

Service of the petition

There must be personal[2] service of the sealed copies of the petition upon each of the persons named in it. If it be established

[1] The Denning Committee has recommended that the necessity for leave to be obtained should be abolished.

[2] The Denning Committee has recommended that where service can be effected by registered post, and an acknowledgement of service in writing obtained, personal service should not be necessary.

that personal service is not possible, leave may be obtained for substituted service, i.e., service by advertisement, or, more rarely, upon some third person through whom knowledge of the proceedings is likely to come to the party who should be served. In very rare and exceptional circumstances, service may be dispensed with entirely. To obtain leave for substituted service of any kind, evidence must be forthcoming that exhaustive enquiries for the whereabouts of the person to be served, have been made but with no results. Leave is not readily granted, and the evidence showing the impossibility of personal service must be conclusive.

The parties served must be identified at the time of service, for the court requires strict proof that the right persons have been served. At service on the other party to the marriage, he or she must be identified to the process server *as the husband or wife* of the petitioner. For instance, if it be necessary to serve John Smith with the petition, it is not sufficient to show that *a* John Smith has been served. The process server will have to show that the John Smith who was served with the petition, was known, or identified to him, as John Smith the husband of the petitioner. The same strictness of proof is not required when the other persons named in the petition are served, unless they are liable to be condemned in the costs of the proceedings. In that case, the process server will have to prove that the person served was known, or identified to him as the person with whom the respondent is alleged to have committed adultery.

The identity of the persons served with the petition may be established at the hearing of the petition in a number of ways,—by visual recognition, by photograph (provided it is a recent and a good photograph), by signature on a copy of the petition, or by a receipt given for the sealed copy that was served. Any defect in identification, or in service of the petition, is rectified if the person served enters an appearance, unless, of course, he or she contends that it is a case of mistaken identity, and that the wrong person has been served.

APPEARANCE

It does not necessarily follow because a person has entered an appearance, that the petition will be contested. It merely means that such person wishes to be represented, and that he accepts the fact that the court has jurisdiction to hear the petition, and to grant or refuse the relief that is sought.

If a respondent claims, for reasons of domicile, residence, or other basic fact, that the court has no jurisdiction to hear the petition, a qualified appearance should be entered. This is called

an appearance "under protest", and the vital issue of jurisdiction is immediately raised. All further proceedings in the suit are stayed until this issue is decided, and the competence of the court determined. If it be found that the court has no jurisdiction, the petition fails, and must be dismissed; if it be found that it has jurisdiction, the petition proceeds once more.

When any person who has been served with a copy of the petition, intends to contest it, an entry of appearance is the first step that must be taken. It is followed at a later date by the filing of a formal answer to the charges that are made, and a defended suit comes into being.

But it may be that such person does not wish to contest the main issues raised by the petition, but wishes to be represented, and to be heard on other matters that may affect him. To do this he must enter an appearance, either generally, or limited to the specific matters upon which he wishes to be heard, such as, costs, custody and maintenance of children, alimony pending the suit, or damages. Though to be heard on the question of alimony or damages, it is necessary to file also a formal answer to the claim. Except in special circumstances, a general appearance is preferable to one limited to a specific matter, for by it, all matters are covered, even after decree *nisi*, and notice of every step that is taken by the petitioner in prosecuting the suit must be given to all the parties who have appeared.

The only person placed in a dangerous position by the entry of appearance, is a named woman, against whom no claim for costs is made. If she obtains leave to appear and intervene in the suit, she lays herself open to be condemned in the costs of the proceedings. Respondents and co-respondents incur no extra risk by the entry of appearance, for their liabilities have already been incurred. It is often to their advantage to enter an appearance. The extra costs incurred by so doing are comparatively small, and their burden is outweighed by the advantage of knowing what is being done in the suit, and how it is proceeding.

How appearance is entered

Appearances must always be entered in the registry in which the petition was filed. They may be entered by the party in person, by a solicitor acting on his or her behalf, or by prepaid post. The act of entry is the presentation of a memorandum of appearance in duplicate,[1] and the payment of a fee of 2*s.* 6*d.* for each person appearing. The duplicate memorandum is endorsed with the fact of the entry of the appearance, and is returned to the person

[1] The necessary forms may be purchased at any law stationer's shop.

who delivered it. It should be carefully preserved, as it is conclusive evidence of the entry of the appearance.

The form of memorandum must contain an address at which service of notices and documents which do not require personal service, may be effected by leaving them at that address. This address must be within the jurisdiction, i.e., within England or Wales. If the appearance be entered by a solicitor, the address is usually his place of business, or that of his professional agent; if it be entered in person, or through the post, the address must be where the party resides, or carries on business, or one within the district of the registry in which the suit is proceeding.

If appearance be entered at the Divorce Registry, Somerset House, London, or in person at a district registry, the party who is appearing must inform the solicitor acting for the petitioner, in writing, that an appearance has been entered. If the appearance be entered at a district registry through the post, the registrar will send the necessary information to the solicitor for the petitioner.

ANSWER

It only becomes necessary to file an answer when it is desired to contest the charges made in the petition, and so defeat the claim for relief that is made. When an answer has been filed, the suit becomes a defended cause, and must be placed in the Defended List for trial.

Particulars of charges made

It often happens that the charges made in a petition are not sufficiently explicit to enable a complete answer to be made. In such a case, the solicitor for the petitioner should be asked, by letter, to give in writing fuller particulars of the charges. This letter must specify the nature of the particulars required, e.g., the time, date and place of the commission of the offences. If these are not supplied, the remedy is to take out a summons asking that the petitioner be ordered, under pain of the dismissal of the petition, to give the particulars asked for. If the refusal to give them in response to the letter that was first written be unreasonable, or done out of spite, the order may provide that the costs of all parties to the summons be paid by the petitioner.

If particulars of the charges are given, but they are still insufficient, or evasive, an order for still further and better particulars may be obtained. It may be that fuller particulars of the charges cannot be given. When that occurs, the petitioner must file an affidavit to that effect, and undertake to give them if and when he is able. In addition to the affidavit, he may be ordered to

give a statement of the substance and nature of the case he intends to put before the court at the hearing. Whether the respondent obtains the particulars that he has asked for, or whether he obtains a statement of the substance and nature of the case that is to be proved against him, he is in a good position, for he has pinned down the petitioner within certain known limits, and is therefore in a position to give a complete answer.

The petition, any particulars that may be filed, the answer, and any other documents that may make or refute charges, are known by the collective name of "pleadings". They constitute the body of the case, and neither party may extend it beyond their limits without leave of the court. The respondent knows what he has to face, and no surprise in the nature of new charges can be sprung on him at the hearing.

Simple denial of the charges made

The nature of the answer that may be made is naturally dependent upon the evidence that can be brought forward to refute the charges made in the petition. The simplest form of answer is a bare denial. Its effect is to reduce the evidence that may be called, to that in proof, and in rebuttal of the charges.

Cross charges

But in addition to a denial of the charges made in the petition, or in place of such denial, an answer may make cross charges against the petitioner. These may be matters on proof of which the respondent is entitled to ask for relief. If this be so, and he desires relief, he must add a prayer to the answer, asking that the petition be dismissed, and that the relief he desires shall be granted to him. This prayer is similar to that placed on the petition, and its effect is to convert the answer to a petition on behalf of the respondent. This course is often followed in preference to the filing of a cross petition. It obviously has the advantage of saving much expense. Notices similar to those endorsed on a petition, and addressed to the parties named in the answer are endorsed on the answer, and sealed copies of the completed document must be served upon them.

But it is open to the respondent to make his cross charges and claim for relief by means of a separate petition. This proceeds apart from the other petition, until the pleadings in both of them are complete. They are then consolidated, and heard as one cause by the court. Except in very rare cases, there is little or no advantage in following this course, for it adds considerably to the expense of the proceedings.

It may be that a party cannot, or does not wish to deny the charges made in the petition, but that he wishes to bring to the notice of the court certain matters in extenuation of his conduct, or matters relating to the marital life of the parties of which the court should have knowledge. These are generally known as "bars to relief", for, by the statutes, they are matters which the court must consider when deciding whether relief shall be granted. In fact, the statutes are so explicit with regard to them, that even though they are not pleaded in an answer, if the evidence points to their existence, the court must investigate, and take them into consideration in giving its judgment.[1]

Bars to relief are of two kinds,—those which are an absolute bar, and those in regard to which the judge may exercise his discretion.

Discretionary bars to relief

When certain acts or conduct on the part of the petitioner can be proved, the grant of relief is within the discretion of the judge who hears the petition. The exercise of this discretion is personal to the judge, and is uncontrolled. It must, of course, be exercised judicially and with due regards to the facts proven in the case. It is only when it can be established that this has not been done, that a successful appeal from the exercise, or refusal to exercise discretion, can be made to a higher court. The general attitude of the judges today is to take a very broad view of matrimonial relations, and to consider primarily the effect of their actions on public morals, rather than in their effect on the particular case before them.

Since a judge is not bound to grant a decree, even when the charges made by the petitioner are established beyond question, when a matter which is a discretionary bar is present, the peculiar circumstances of a case may cause him to grant a decree on conditions. A common example of this is when a wife, who has committed adultery, has been abandoned by the co-respondent, or he is unknown, and she has no means of support. If the evidence brought forward in the suit shows that her husband had neglected her, or had been cruel to her, or had himself been guilty of adultery, a judge will not grant him a decree unless he consents to make some financial provision for his wife so long as she remains single and chaste. By so doing, he expresses his

[1] Supreme Court of Judicature (Consolidation) Act, 1925, S.178, as amended by the Matrimonial Causes Act, 1937, S.4.

disapproval of the conduct of the husband, and safeguards the future of the wife, who might otherwise, through force of circumstances, be driven to make a living by doubtful means.

Petitioner's adultery

If the petitioner has been guilty of adultery during the subsistence of the marriage, the court must be asked to exercise its discretion in his or her favour, and during the course of the proceedings, disclose the details of the adultery to the judge. If the adultery be not disclosed, but is subsequently discovered, the results may be very serious. The least that may happen is the adjournment of the hearing for the amendment and re-service of the petition, and compliance with the special rules applicable to such cases. But it is as likely as not that the judge will refuse to exercise his discretion, and will dismiss the petition. If the adultery comes to light after a decree *nisi* has been pronounced, the intervention of the King's Proctor is inevitable. At whatever stage of the proceedings the concealment is discovered, much additional expense is incurred, with a corresponding increase in the costs of the proceedings. Where the petitioner sues as a poor person, non-disclosure may have still more serious results. The poor person certificate may be withdrawn, with the consequent abandonment of the proceedings. The solicitor assigned, who makes no profit out of the case and has undertaken its conduct as a voluntary task, will probably refuse to do anything more for a petitioner who has not been so frank with him as he should have been.

It therefore cannot be impressed too strongly on an intending petitioner that there must be the fullest possible disclosure of any adultery that may have been committed. It is a painful matter, but one that is unavoidable.

The prayer to the petition must ask the court to exercise its discretion in favour of the petitioner, but at the time of its filing, no particulars of the adultery need be given. It is not the duty of the petitioner to supply information which may lead to counter charges being made against him. At a later stage in the proceedings, when the pleadings come up for examination before the cause is set down for trial or hearing, details of the offences must be given. This takes the form of a full statement, without any evasion or equivocation of any kind. It is lodged in a special envelope which must be sealed, and which is only opened by the official whose duty it is to see that all the documents in the suit are in order. Immediately that is done, the envelope is again sealed until it is opened by the judge at the hearing.

A discretion statement is not a pleading, and cannot be used in evidence against the petitioner. Its purpose is merely to give information to the judge, so that he may be able to decide whether or not he will exercise his discretion. After a decree *nisi* has been pronounced, it may be inspected by the King's Proctor, who will compare it with any information he may have in his possession. The importance of its being a full disclosure therefore becomes still more evident.

Delay in taking proceedings

Provided there is a reasonable excuse for it, delay in taking proceedings is not an insuperable bar to relief. But if it be culpable, as when it is the result of the petitioner having acquiesced in, or having been indifferent to the offences committed, it is a serious matter bordering on conduct conducing to the offence, or even connivance in their commission.

Delay in seeking relief throws doubts on the sincerity of the petitioner. Knowledge of a matrimonial offence, which is ignored, gives rise to the presumption that the petitioner was at the date of its discovery, insensible or indifferent to the conduct of the respondent. This presumption is far from being conclusive, and may be rebutted in many ways,—lack of means, ignorance that relief could be obtained, a hope of reconciliation, a desire to avoid hurting children who are in their minority, or who might be adversely affected by proceedings being taken, or other like reason.

When the petition is for restitution of conjugal rights or for nullity of marriage, delay in taking the proceedings is regarded more seriously than in the other forms of relief. A delayed application has little element of sincerity, and the suspicion arises that the proceedings are being taken with some ulterior motive. Over a period of years, it is possible that the parties to the marriage have accepted their difficult and unhappy position, and by so doing have obtained certain advantages, and interests have become vested. These should not be disturbed unless there is a sincere desire for relief on the part of the petitioner.

Conduct conducing to the offence

In divorce proceedings based on adultery, unsoundness of mind, or desertion, the conduct of the petitioner has a great bearing upon the grant of relief. It was a maxim of the judges of the old courts of equity that "he who comes to court must come with clean hands", and if the conduct of the petitioner had sullied them, relief would be refused, or only granted on

terms. The principle is still applied today, and if the conduct of the petitioner be open to reproach, and has been such as to have conduced to the offence committed, a very serious view is taken of it. Sins of omission as well as commission constitute conduct conducing to the offences charged. Neglect of a spouse, indifference to wild, wilful or indiscreet conduct, cruel treatment, or desertion, are viewed alike, and their effect upon the offences charged against the respondent is carefully examined.

Conduct conducive of adultery is very much akin to connivance at adultery. The dividing line between the offences is very fine, and when the conduct approaches it, the matter becomes very serious. Fortunately, the judges have a great knowledge of the failings of human beings and are inclined to be charitable. Whenever it is possible to do so, they lean towards a finding of conduct conducing to the offence, rather than connivance at the offence.

Absolute bars to relief

When certain other acts or conduct of the petitioner are proved, the court has no discretion in the grant of relief. The statutes expressly lay it down that the petition shall be dismissed.[1] Such acts or conduct consequently act as an absolute bar to relief of any kind.

Connivance

The most serious offence constituting an absolute bar, is that of being accessory to, or conniving at the adultery alleged to have been committed. When it is proved, not only is the petition dismissed, but the finding acts as a bar for all time to any further suit brought on the grounds of adultery, by the person who has been found guilty of the offence.

Being accessory to, or conniving at adultery may take a variety of forms. There may be acquiescence in, or consent to adultery. This is a rare form of the offence. It arises when a husband accepts the fact of his wife's life of prostitution, or wilfully closes his eyes to any adulterous association she may have formed. It also arises when a husband accepts money (maybe ostensibly as damages) from the co-respondent, on the understanding that he will not seek any further damages. Such an agreement is virtually a licence to commit adultery, which is connivance in its worst form. When a wife who has discovered that her husband has committed adultery, takes advantage of it to extort from him a

[1] Supreme Court of Judicature (Consolidation) Act, 1925, as amended by the Matrimonial Causes Act, 1937, S.4.

deed of separation providing her with generous maintenance, she is very near the offence of connivance. If she takes proceedings against her husband at a later date, she will have to prove her innocence in respect of the deed. It will be necessary for her to establish that it did not carry with it the slightest approval of the adultery committed, nor that it was intended to give a tacit permission to continue the adultery.

There may be conduct that induces, or brings about adultery. This generally arises when an arrangement is entered into between the parties to a marriage that one of them shall commit adultery, so as to give the other a ground for divorce. It can best be described as the manufacture of evidence for the purpose of divorce proceedings. In this form of connivance, the acts of agents are deemed to be those of the principals, even though they go beyond the limits of their authority.

Toleration of conduct that would, to the mind of the reasonable average man, inevitably lead to adultery, is not an uncommon form of connivance. Toleration of this kind is a matter of degree. In its mildest form, it would amount to conduct conducing to the adultery; in its worst form, it would be connivance. So that a husband who regards his wife's loose conduct with other men with equanimity, runs a risk of the inference being drawn that his indifference conduced to any adultery that might have been committed. If his indifference were very pronounced, or if his negligence were so great as to amount to the encouragement of improper familiarities at the hands of other men, the inference of connivance would most certainly be drawn.

The court is very loth to infer that a party to a marriage has expressly or impliedly given his assent to his own dishonour, and for that reason there is never a presumption of connivance. The inference will only be drawn on the most conclusive and unmistakable evidence. If there be a doubt, the petitioner will be given the benefit of it, and his conduct will be taken as conducing to the adultery, rather than connivance at it.

Condonation

Condonation is the complete forgiveness of offences that have been committed, followed by cohabitation. It is of its essence that one spouse, with full knowledge of the offence committed by the other, should forgive that other, and confirm that forgiveness by reinstatement. Two elements are therefore involved,—the one, full knowledge of the offence committed; the other, a reinstatement of the guilty spouse to the position occupied before the discovery of the offence.

If an offence be condoned as the result of a deliberate misstatement by the guilty spouse, or by a fraudulent misrepresentation of the facts of the offence, there is no real condonation, and proceedings may be taken on that offence when the misstatement or misrepresentation is discovered.

There is no such thing as conditional condonation, so that an offence cannot be condoned conditional on future good behaviour. Whether the future behaviour be good or bad, the offence still remains condoned. This is especially so, if the forgiveness has been confirmed by intercourse between the parties.

Condonation is only a bar in the suit in which it is found. If it be established, the petition *must* be dismissed. If further grounds for a petition are discovered at a later date, a petition based upon them may be presented to the court. These latter offences have the effect of reviving the condoned offences, and they may also be pleaded in the new petition. They need not be of such a nature as to give, in themselves, a ground for relief before they can revive condoned offences. So that desertion for a period of less than three years is sufficient to revive condoned cruelty, desertion, or adultery.

Collusion

Collusion is an agreement between the parties to a marriage that one of them shall present a petition for divorce. Its essentials are, not that a false case should be presented, but that a case should be presented by the parties acting in concert and by agreement. This does not mean that the mere expression of a desire for a divorce by the parties to the marriage amounts to collusion, unless that expression of desire is coupled with the express or implied suggestion that one of them should commit a matrimonial offence for that purpose, and the suggestion is acted upon.

A "hotel case" staged with the concurrence of the other spouse, is a fairly common example of a collusive action. So is also an agreement not to defend any suit that may be brought. Money payments by one party to the other, especially by the wife to the husband, raise grave suspicions of collusion. If there be no satisfactory explanation for them, they will be deemed to have been made as a result of an agreement to expedite and smooth the passage of the suit, and so will be held to be collusive. A suit for divorce may not be the subject of a financial bargain, and if it be established that money has been paid or promised with the object of furthering the passage of the suit, collusion will be found. It is only the particular facts of each case of this kind that can determine whether it is collusive or not.

An agreement to conceal from the court the true facts of the matrimonial life and relations of the parties is collusion. So that if it be discovered during the course of the proceedings that there has been suppression of the fact that the petitioner has been cruel to the respondent, or has been neglectful of her, or has been guilty of some other matrimonial offence, there is a possibility of collusion being found, with the consequent dismissal of the suit.

Collusion is only a bar to relief in the suit in which it is found, except when evidence of adultery has been supplied at the request of one of the parties. In that case, both parties have been accessory to, or have connived at the adultery committed, and have so debarred themselves from relief on the ground of adultery for all time.

FURTHER PLEADINGS

When charges are made against the petitioner in the answer to the petition, they must be replied to. So that whenever an answer goes beyond a simple denial of the charges made in the petition, the petitioner must answer them in the form of a reply. This is the only time that a reply is necessary, and will be permitted.

It is rare that pleadings go beyond reply. But if the circumstances of the case call for it, leave may be granted allowing the filing of a rejoinder to the reply. This, by leave, may be followed by a surrejoinder, and even by a rebutter and surrebutter, but the circumstances that call for such remote pleadings are so rare and exceptional, that they need not be dealt with.

CHAPTER III

CONCERNING TRIAL OR HEARING: SECURITY FOR WIFE'S COSTS: PROCEEDINGS IN COURT: CONDEMNATION IN COSTS: THE KING'S PROCTOR: DECREE ABSOLUTE

WHEN THE PLEADINGS in a suit are complete, it must be set down for trial or hearing. A defended cause is said to be "tried"; an undefended cause is said to be heard.

Place of trial or hearing

When a suit is defended, the solicitor for the petitioner must give notice to all parties who have entered an appearance, of

the place where he intends to apply that it shall be tried. The parties that have filed answers, must file a statement setting out the number of witnesses that they intend to call, and where they each reside. They may then suggest a place at which the suit shall be tried. If there be any disagreement as to the place of trial, the registrar of the registry in which the cause is proceeding, will make the final decision.

When a suit is undefended, the solicitor for the petitioner must file an affidavit in which he discloses the number of witnesses that will be called at the hearing, and where each of them resides. He may suggest in this affidavit where he would like the hearing to take place. If the place suggested does not appear to be the most convenient for the petitioner and the witnesses, the reasons for its selection must be given.

The certificate of a registrar that the pleadings and proceedings in the cause are in order, must now be obtained. At the time of granting this certificate, the registrar will give directions as to the place of trial or hearing. In deciding this matter, he will consider the residential locality and convenience of the parties and their witnesses, the costs involved, the date upon which the trial or hearing can take place, and the relative facilities for trial or hearing in London, or at one of the assize or special provincial courts having jurisdiction in divorce.[1]

The List

When the registrar has granted his certificate, the petitioner's solicitor must set the cause down for trial or hearing in the appropriate list of the court indicated by the registrar. If he does not do so within fourteen days of the date of the certificate, any party who is defending the suit may do so. In either case, it must be set down within twenty-eight days of the issue of the certificate.

Whoever sets down the cause must give notice to all parties who have entered an appearance that he has done so, and that it will appear in a certain list of causes for trial or hearing. When he has done this, his responsibilities in that direction cease. It is then the duty of each party to find out for himself the position of the cause in the list, and the day upon which it will come before the court.

If the place of hearing directed by the registrar be London, the cause is placed in the list for the next following term. This list is generally made public a week or so before the beginning of that term, and may be inspected on the notice boards of the Divorce Registry at Somerset House, London, or upon the notice

[1] A list of the assize courts having jurisdiction in divorce will be found in Appendix I, p. 127.

board outside the room of the Clerk of the Rules at the Divorce Court, Royal Courts of Justice, London. When the lists have been printed and published, they may be purchased through the Stationery Office.

If the place of trial or hearing directed by the registrar be an assize court, or one of the special provincial divorce courts recently created, the list may be inspected at the district registry of the High Court in the town where the court is to be held, or in certain cases at the district registry indicated against the name of that town in the table contained in Appendix I (p. 127), about twenty-one days before the court will sit.[1]

Unless a day has been specially fixed, it is often difficult to ascertain the day and time of the trial or hearing of a particular cause, before the afternoon of the preceding day. In London, the list of causes to come before the court on the next day, is posted outside the room of the Clerk of the Rules at the Divorce Court; at an assize, or special provincial court, outside the room of the Associate or Registrar in the law courts where the court will be held. Certain London newspapers publish the daily cause lists on the morning of that day, and most provincial newspapers circulating in the town publish it the evening before, or on the morning of that day. But reliance on newspapers gives very short notice as to when the parties and their witnesses must appear. Generally, the solicitors of the parties concerned watch for the list, and telegraph their clients as soon as the day and time are known. The court accepts no excuse for failure to attend, and if the parties and their witnesses are not present when the cause is called, it may be transferred to the bottom of the list, or even to a later court.

SECURITY FOR WIFE'S COSTS

When a cause is set down, a very important step should be taken by the solicitor acting for a wife who is a petitioner, or who is a respondent defending the suit. This is to obtain from her husband security for the costs of the further proceedings. If this be not done, a serious financial position may arise if her petition or defence be unsuccessful.

In the great majority of cases, a wife has not the means to prosecute or defend a suit for divorce. It may be that she can borrow money for that purpose, or that her solicitor is prepared

[1] The date of the Commission Day for an assize, or for the holding of a special provincial court, may be ascertained from any law journal, from a police office, or the local registry of the High Court of Justice (usually the local County Court).

to give her credit, but either course is most unsatisfactory. Provision has therefore been made for her to obtain an order for the payment of her costs of the proceedings up to the stage of setting down the suit, and for the payment into court of a sum of money estimated to be sufficient to cover the probable costs from the stage of setting down the suit, to its conclusion. To obtain such orders, the solicitor acting for a wife petitioner or respondent, must lodge for taxation, a detailed bill of his costs up to and including the setting down of the cause for trial or hearing. By "taxation of costs" is meant the examination of the items of a bill of costs by an officer of the court, and in respect of which an order compelling payment is required. This officer reviews each item of the bill, and allows, reduces, or disallows it in accordance with certain fixed principles. When this has been done, an order is made calling upon the husband to pay to the solicitor acting for the wife, the total amount allowed by the taxing officer as proper costs. If the husband can establish that his wife has means of her own sufficient to meet the bill, he may be ordered to pay the sum assessed into court, where it will remain until a judge finally decides who shall pay the costs of the proceedings. The next stage of the appointment before the taxing officer, is the discussion of the anticipated costs of the proceedings which will be incurred up to their termination. These will vary with the circumstances of the case. If witnesses have to be brought from a distance, or have to remain in a town overnight, there will be a corresponding increase in expenses. Where it has been found necessary to employ enquiry agents, or if the intricacies of the case call for the employment of a "silk" (*i.e.* a leading, or King's counsel), the costs that will be incurred will be much greater, and the sum ordered to be secured correspondingly increased. All these, and other matters, are put before the taxing officer, who then decides upon the sum that he considers sufficient to cover the further costs of the suit. This may vary from a nominal sum in a suit proceeding under the Poor Person Rules, to hundreds of pounds in a suit where the expenses are likely to be extremely high. In the generality of paying cases, it ranges from twenty to seventy pounds. An order is then made calling upon the husband to pay into court the sum assessed, where it will lie until a judge finally decides who shall pay the costs of the proceedings.

PROCEEDINGS IN COURT

A *defended* cause is opened by a speech from the counsel for the petitioner. In this, he indicates to the judge the main points of

his case, and the nature of the evidence which he intends to put before the court. This is followed by the evidence of the petitioner, and of the witnesses on his or her behalf. Each of them may be cross examined by the counsel for the parties who are defending the suit, in which case, they may be re-examined by the counsel for the petitioner on matters arising out of the cross examination, and which still remain obscure. The defence is then opened in a similar manner, and the parties defending, and their witnesses, are examined, cross examined, and re-examined. Each counsel now addresses the judge on the merits of his case, as supported by the evidence of his client and witnesses. The judge then summarizes the evidence, and gives his judgment.

In *undefended* causes, the procedure is very much simpler, as there is generally only one counsel, and there is no cross examination and re-examination of the petitioner and witnesses. When there is any matter in doubt, the judge will himself examine the witnesses, or instruct counsel to do so.

The hearing of undefended causes usually follows a fixed course, with the result that they can be disposed of at a very rapid rate. Provided counsel is competent, and no matters out of the ordinary arise, an undefended cause may be heard and decided in a matter of minutes. To the uninitiated, this sometimes gives an impression of ease and lack of care in the examination of the facts, with the result that there is often a common impression that the hearing of an undefended divorce suit is a formality. Nothing could be further from the truth, and the intelligent spectator of a number of cases will perceive an ordered routine which omits no essential fact of evidence. He will hear the formal evidence of the petitioner given in answer to leading questions, but immediately material evidence is approached, the leading questions cease, and the witness must give that evidence in his or her own words. The routine is more or less fixed, and it is only the sudden intervention of the judge that brings home the fact that each piece of evidence must fit perfectly into the whole. The slightest flaw or discrepancy is seized upon by the judge as a matter for fuller investigation.

Witnesses

Witnesses are usually served with subpoenas, so as to ensure their attendance at court. This is always done if there be any unwillingness to give evidence. When served with a subpoena, the witness must be paid a reasonable sum to cover his expenses to and from the court, from his place of residence. Disobedience to a subpoena that has been properly served, is a serious

matter. It is contempt of the court, and may be punished as such.

There are two kinds of subpoenas,—the one, for the purpose of compelling the attendance of a witness to give oral evidence, and the other, to compel him to attend and produce books or documents that are in his possession. This latter subpoena must specify the books and documents that must be produced.

Protection of witnesses

When proceedings are instituted in consequence of adultery, no witness is bound to answer any questions that tend to show that he or she has been guilty of adultery, unless such witness has already given evidence in the same proceedings in disproof of the alleged adultery.[1] This is a most valuable privilege, for under it, any person who is mentioned in a pleading as having committed adultery, may refuse to give evidence concerning it, even though he or she has been compelled to attend the court under a subpoena. When such a witness is placed in the witness box, it is the duty of counsel to give the warning that there is no compulsion to give evidence. If the witness be prepared to do so, the evidence will be accepted; if not, he or she will be told to leave the witness box.

Husbands and wives are privileged as to communications made between them during the subsistence of the marriage, and neither of them may be compelled to disclose any such communications.[2] Marital confidences are thus well protected.

Solicitors have privilege on the subject of communications made to them by their clients in the course of the preparation of the suit. They therefore cannot be compelled to disclose anything that has been told to them by their clients in the privacy of the consulting room.

Ministers of religion, and priests of any order, have no privilege whatsoever as regards communications made to them, and they can be compelled to disclose such communications even though the disclosure involves a breach of professional secrecy, or breaks the seal of the confessional.

Medical practitioners have no privilege as to communications made to them by their patients, nor as to the maladies from which they have been suffering. They can be compelled to disclose such matters, even though they concern diseases the treatment of which is regulated by the government under conditions of secrecy.

[1] Supreme Court of Judicature (Consolidation) Act, 1925, S.198.
[2] Evidence Amendment Act, 1853, S.3.

After he has given his judgment in the suit, the judge will hear and consider applications relating to costs, the custody of children, and damages.

If it be desired that any party to the suit be condemned in the costs of the proceedings, the judge must be asked to make an order to that effect. The divorce court differs from the courts of common law in that the unsuccessful party is not automatically condemned in the costs of the proceedings. The making and the terms of an order for costs are entirely within the discretion of the judge, and this discretion is not limited or fettered in any way.

Successful wife

A wife who has been successful in her prosecution or defence of a petition, may always obtain an order for costs against her husband. If she brought charges against a named woman which have been proved, she may obtain an order against her also, provided that she took the precaution of asking in her petition or answer, that the woman be condemned in costs. If the woman be a married woman, there is no need to prove that she possesses property of her own, and apart from her husband. A married woman is now responsible for the consequences arising out of her torts or wrongdoing. Her husband cannot be made liable for them.

Unsuccessful wife

The importance of a wife's obtaining an order for the lodgment of security for her costs, before the hearing of the petition (*supra*, p. 56), arises when her prosecution or defence of the suit has been unsuccessful. If there be no order, she rarely, if ever, obtains an order for the payment of her costs. But if security has been ordered, even though the order has not been complied with, her husband will be ordered to pay her costs up to the amount ordered to be secured. This amount was assessed on the assumption that the trial of the suit would not last longer than a day. If it exceed that period, the judge should be asked to extend the security. This, when done, has the curious result of enlarging the security to such an extent that it covers the whole of the costs incurred by the wife. Of course, if her husband proves that she is in possession of property of her own, out of which she would be able to pay her own costs, no order for costs will be made against him.

Successful husband

A husband who has been successful in his petition against his wife, may obtain an order for costs against the co-respondent named in it, provided (1) that the evidence has established the identity of the co-respondent with the person with whom the wife committed adultery, and (2), it has been proved that the co-respondent knew at the time that he committed adultery, that the woman was a married woman. If there be more than one co-respondent, an order may be obtained against any or all of them.

A husband may also obtain an order for costs against his wife, but such an order will be of little value unless she has means of her own out of which she can pay them.

Successful co-respondent

When a co-respondent has been successful in his defence of the suit in which he is named, he may obtain an order for costs against the unsuccessful husband petitioner. But this will not be done, if it has been established that, even though he is innocent of the adultery alleged, his conduct has been so reckless and injudicious, he has only himself to blame for the position in which he finds himself.

Successful intervener

A named woman, who intervenes and is successful in her defence of the petition in which she is named, may obtain an order for costs against the petitioner. It will not be necessary for her to prove that the petitioner has separate estate, for the order for costs may be made against the petitioner and her husband.

Costs in poor person suits

In suits proceeding under the Poor Person Rules, orders for costs are usually limited to the payment of out-of-pocket expenses. These are the actual payments that have been made, and do not include any allowance for the profit costs of the solicitor, or even for his stationery and office expenses. The sum of money that was deposited with the law society which granted the certificate, is deemed to be included in the order.

If the person who is condemned in the costs of the proceedings has not been admitted to sue or defend as a poor person, and it is considered that he is in a position to pay full costs, the order may provide that he shall pay the profit costs of the solicitor, in addition to the out-of-pocket expenses of the petitioner.

Where a person has been admitted to sue or defend as a poor

person, as the result of untrue or fraudulent statements made by him, he may be ordered to pay the full costs of the proceedings as though he were not a poor person.

If there be special circumstances in a poor person suit (as when the person condemned in the costs has acted unreasonably in bringing or defending the proceedings, or his conduct of them has been unreasonable, or the proceedings have been so lengthy and difficult as to throw an unusual burden on the solicitor), the order may provide that the costs awarded shall include the profit costs of the solicitor, or shall mention a definite sum to be paid to the solicitor as a recompense for his labours. These costs are in addition to the out-of-pocket expenses of the poor person.

Whatever form the order may take, it may never include the payment of a fee to counsel, nor of the court fees that would have been payable had the suit been conducted outside the Poor Person Rules.

CUSTODY OF CHILDREN

When a decree *nisi* is pronounced in a suit, the judge may make an order providing for the custody of the children of the marriage. On the principle that the paramount consideration in making orders concerning children, is their welfare, the judges will not hear argument and contention in open court. If the parties to the suit have not agreed as to the future of the children, the question as to whom shall have their custody is generally adjourned, to be heard at a later date in the privacy of the judge's chambers.[1]

DAMAGES

When a husband claims damages from the co-respondent in the suit, the assessment of the amount of damages to be paid is generally made by a jury. But if it be so desired, an order may be obtained without difficulty, allowing the assessment to be made by the judge who hears the suit. During the Second Great War, damages have been assessed by the judge, so avoiding the calling of juries for that purpose.

The petitioner must always set out in the prayer to his petition, the amount of damages that he claims he has suffered as a result of the break up of his home. This amount is never disclosed to the jury, who must arrive at the value of the damage done without reference to it.[2] Whatever sum is awarded, the decree will recite

[1] The question of the custody of children is dealt with fully under "Maintenance of Children", *post*, Chap. iv, pp. 67–72.

[2] The principles upon which damages are assessed are dealt with in Chap. I, *ante*, p. 40.

it, and further order that the co-respondent pays it into court within a stated time. There it will remain until the decree is made absolute, and an order obtained for its allocation.

APPEALS

Any appeal against the grant, or refusal to grant a decree, must be made to the Court of Appeal within six weeks of the grant or refusal. This time may not be extended without the permission of the Court of Appeal, which is only granted upon good and sufficient cause being shown.

There is no appeal to the House of Lords unless the Court of Appeal or the House of Lords itself, grants leave in special circumstances.

There is no appeal against a decree absolute if the proposed appellant had time and the opportunity to appeal against the decree *nisi*.

INTERVENTION AFTER DECREE NISI

The King's Proctor, or any member of the public, may intervene after a decree *nisi* has been pronounced. An intervention by a member of the public is very rare, but the King's Proctor often intervenes.

The King's Proctor is a public official whose duty it is to see that no decree is made contrary to the justice of the case. His powers may be exercised at any stage of the proceedings, and he may intervene at any time. The court may also call upon him to be represented at the hearing of a suit in which matters may arise having an effect on public policy or morals. But in the generality of cases, he does not become interested until a decree *nisi* has been pronounced. Every case is then brought to his notice for investigation. He examines the evidence in the light of any information that has been given to him, or which has been discovered by his agents. If he comes to the conclusion that a false case has been presented, either by perjured evidence or by the suppression of the true facts of the relations of the parties, he reports to the Attorney General, who may direct him to intervene with a view to obtaining the rescission of the decree. This intervention takes the form of the entry of an appearance by him, and the filing of a Plea which sets out the grounds for the intervention. A copy of this document is served upon all the parties named in it, and the proceedings then follow a course similar to that followed by an original petition. Until the intervention is disposed of, no application to make the decree *nisi* absolute can be accepted.

The costs of a successful intervention by the King's Proctor are generally payable by the petitioner; the costs of an unsuccessful intervention are expenses of his office, since he fulfils a public duty by intervening.

Members of the general public are allowed to intervene after a decree *nisi* has been pronounced for the reason that divorce is a matter that affects public morality, in which every citizen is deemed to be interested. A party to the suit may not intervene, for his remedy is to appeal against the decree.

Interventions by members of the public are always made at the intervener's risk as to costs. The consequence is that few people intervene, for unless they are successful, they will have to pay the costs of all the parties. In recent years, there have been two successful cases of intervention,—one on the ground of the petitioner's undisclosed adultery, and the other on the ground of collusion. In neither case had the offences come to the notice of the King's Proctor.

Reconciliation after decree nisi

When the parties to the marriage become reconciled after a decree *nisi* has been pronounced, application should be made for the rescission of the decree. This may be done with little difficulty and at small expense. If application be not made, the King's Proctor will intervene for the same purpose, and the petitioner will be liable for his costs.

DECREE ABSOLUTE

An application may be made by the petitioner for the decree *nisi* in a suit to be made absolute, at any time after the expiration of six weeks from its date. This period may only be shortened by leave of a judge, who will not do so unless the most urgent reasons are put forward, and he is satisfied with them. The leave will be qualified by the proviso that the King's Proctor does not object. It is most unlikely that there will be any abridgement of the six week period in future cases, for it is only recently that the statutory period of six months has been reduced by a general order of the court.

The most common ground upon which an application to shorten the period is made, is that one of the parties has urgent reasons for re-marriage at as early a date as possible. These reasons must be substantial,—such as the impending birth of a child to the respondent, or to the woman named, and the desire of all the parties that it should be born legitimate. When the proceedings have been protracted by causes beyond the control

of the parties, the court sympathetically considers an application to shorten the period.

The period of six weeks must have come to an end on the day upon which the application for a decree absolute is made. This is not the day upon which the decree absolute is pronounced, but the day upon which the application is filed. The effect is therefore, that the period of six weeks is actually six weeks and some days. In calculating the period, the day upon which the decree *nisi* was pronounced is ignored, but the day upon which the application is made is counted.

Delay in applying for decree absolute

The court does not look with favour upon any delay in making application for a decree absolute. This is especially so when the delay has been caused by the threat not to apply for a decree absolute, has been used by the petitioner, to obtain the payment of costs, or to extract more favourable terms of maintenance. If an application be delayed for a longer period than twelve months from the date of the decree *nisi*, the reasons for the delay must be set out in an affidavit sworn by the petitioner. This affidavit must be submitted to a judge, who, if he be satisfied with the reasons given for the delay, will grant his leave for the application to proceed; if he be not satisfied, a special application will have to be made in open court, when the applicant's counsel will be heard on the merits of the application.

During a period of three months *plus* six weeks following the pronouncement of the decree *nisi*, it is only the petitioner who may apply to make it absolute. When that period has elapsed, an application may be made by the respondent. Such an application must be made in open court, and the usual procedure does not apply. The making of the order is in the discretion of the judge, who may refuse it if the circumstances warrant it. It would be, and has been refused, when the respondent is in contempt, as when he has made no effort to pay the costs of the suit, or has failed to pay the alimony which has been ordered to be paid.

How application is made

All applications for decree absolute must be made in the registry in which the suit is proceeding. If that registry be other than the Divorce Registry at Somerset House, the papers are sent to the Divorce Registry for inclusion in the next list of applications for decree absolute. The actual hearing of the applications is in the Divorce Court in London. A decree absolute cannot be pronounced in an assize or special provincial court.

On the day appointed, the business of the court is announced as being the consideration of the applications to make absolute the decrees *nisi* printed in the cause list for that day. A pause, for the purpose of objection being made, follows this announcement. If there are no objections, the judge pronounces all the decrees *nisi* in the list, absolute decrees. No reference or mention is made to any particular case, all the cases being the subject of one pronouncement.

RE-MARRIAGE AFTER DIVORCE

Any of the parties to a marriage which has been dissolved or annulled, may re-marry after the decree has been made absolute, but the marriage officer who is being asked to solemnize the new marriage will require the production of a certified copy of the decree absolute. If the divorce or annulment was obtained in the courts of England or Wales, this copy may be obtained on application to the Record Keeper, Somerset House, London, W.C.2. A remittance of 7*s*. 6*d*., to cover the search and copying fees, must accompany the application.

Foreign Divorces

When a divorce has been obtained in a foreign country, it is not valid in England or Wales unless it is valid by the laws of the country where the former husband was domiciled at the commencement of the proceedings for divorce.[1] If this condition be not fulfilled, any re-marriage will be bigamous in England or Wales.

At the time when notice of re-marriage is given, a certified copy of the decree of divorce must be produced, or a satisfactory reason for its non-production given. The marriage officer will require to be satisfied that the parties to the marriage which the decree purports to dissolve, were either (1) domiciled within the jurisdiction of the court which granted the decree of divorce, or (2) that the laws of the country in which the parties were domiciled, recognize the decree of divorce as valid. This latter requirement is of the greatest importance when the divorced person comes from a country where jurisdiction in divorce matters is one pertaining to provincial or state laws, rather than to federal or central government laws, as is the case in the United States of America. Two examples may make the matter clearer,—

1. *A*, domiciled in the State of New York, was divorced by the courts of that State. The divorce is valid in England or Wales.

[1] The meaning and effect of the term "domicile" has been previously dealt with. (*Ante* Chap. I, p. 15.)

2. *B*, domiciled in the State of New York, was divorced by the court at Reno, in accordance with the laws of the State of Nevada. If the laws of the State of New York recognize the Reno divorce as valid, it will be recognized as valid by the laws of England and Wales; if they do not, it will not be so recognized, and any re-marriage based on it will be bigamous in England or Wales.

Re-marriage in Church

No priest or minister of the Church of England, or of the Church in Wales, can be compelled to solemnize the marriage of any person whose former marriage has been dissolved on any ground, and whose former husband or wife is living, neither can he be compelled to permit the marriage of any such person in the church of which he is the priest or minister.[1] The rights of a parishioner to the services of his parish priest, and to the use of his parish church, are therefore curtailed to that extent.

CHAPTER IV

CONCERNING CHILDREN

Custody, Access, Education and Maintenance

THE PROBLEMS ARISING out of the existence of issue of a marriage which has been, or is the subject of proceedings in the Divorce Division call for, and receive the most careful consideration of the judges. In the English courts, jurisdiction over children is shared by the judges of the Divorce and Chancery Divisions of the High Court of Justice, and applications with regard to them may be made in either division. There is also a limited jurisdiction vested in County Courts and in magistrates' courts. When there are divorce proceedings pending, it is generally more convenient to have questions relating to children dealt with as part of the proceedings in the divorce court.

Principles relating to custody and access

In whatever court applications having reference to children are made, the first and paramount consideration is the welfare of the children. The legal rights of the parents are secondary matters, and whatever rights a father or mother may have at common law

[1] Supreme Court of Judicature (Consolidation) Act, 1925, S. 184 (2) (3), as amended by the Matrimonial Causes Act, 1937, S. 12.

with regard to the custody and upbringing of the children of the marriage, will only be regarded if they tend to be for the greater welfare of the children. In other words, the court will exercise its powers without any regard to the rights and wishes of either parent, if it be in the interests of the children to do so. The guilt of any one of the parents is not a factor that is taken into consideration to any great extent, and an award of custody, or of the right of access, as a means of punishing a guilty spouse does not enter into the matter at all. From the application of these principles, it follows that the court may ignore the claims of both parents, and may grant custody to a third party, even though such party is not related to the children. This is often done when, in the opinion of the court, it is to the advantage of the children to do so.

There is jurisdiction to make orders affecting children who are under the age of twenty-one years, but it is rarely exercised in the Divorce Court if the child be over the age of sixteen years. This is because a child of that age is deemed to be of an age of discretion, and capable of determining where, and with whom he or she shall live, and with whom he or she shall come in contact. An order for the custody of, or access to such a child, is therefore a bare right so far as the child is concerned, for it can rarely be enforced against the wishes of the child. But as between the parents, it is effective, and action may be taken by the parent in whose favour the order was made, if the other parent violates the terms of the order.

When a parent to whom the custody of a child has been granted, dies, the rights of the other parent revive, unless the order expressly declares that such parent is not a fit and proper person to have the custody of the child. A clause of this nature is rarely inserted in an order, and then only on the most conclusive evidence of unfitness.

CUSTODY OF CHILDREN

Orders for the custody of children may be made in respect of those who

1. are lawful issue of the marriage.
2. were born to the parties before marriage, whether they became legitimated by the subsequent marriage of their parents or not. (This is because a right to custody is based upon parenthood rather than on legitimacy.)
3. have been adopted under an order of a court of competent jurisdiction under the Adoption of Children Act, 1926, or under the laws of the country in which the adoptive parents were domiciled at the date of the adoption order.

An order for the custody of the illegitimate child of one of the parties to the marriage may not be made. But as there is an inherent jurisdiction in the court to make orders affecting the welfare of all children, the mother of an illegitimate child may obtain an order for its "care and control". The difference between such an order and one for custody, is mainly one of description, for the rights, duties and obligations under both types of order are practically the same.

When the question of the custody of children of tender years is under review, it is rare for an order to be made taking a child under the age of five years from the custody of its mother. Similarly, when a child is in a delicate state of health, the court will rarely order its removal from the care of the mother. The view taken is that the care and solicitude of a mother is necessary for the well being of the child. Irrespective of her guilt of the matrimonial charges made in the proceedings, provided that she is a competent and loving mother, the court will generally award the custody of such children to her in preference to the father. When it does award the custody to the father, it is usual for the order to provide that the children shall not be removed from the care of the mother without further order of the court. The effect is therefore that the father gets the bare legal custody of the children, and the mother their actual care and control.

Wards of Court

When the facts of a case point to the desirability of children being made wards of court, an order will be made in the Divorce Court, directing that an application be made to the Court of Chancery for that purpose, and to place them under the protection of that court. This is usually done when the children are entitled to an income or to property, and if the circumstances call for it, the Court of Chancery will make an order that will have effect until the children attain the age of twenty-one years. In the absence of an order of the Divorce Court directing that the children be made wards of court, the Chancery judges will not deal with the matter, for it would be an interference with the discretion of the judges of the Divorce Court.

Removal of children out of the jurisdiction

Any order for the custody of children that may be made, always provides that they shall not be removed out of the jurisdiction of the court without its sanction. As to this, it must be borne in mind that the jurisdiction of the court only extends to England and Wales, so that a child may not only not be taken to foreign

countries in the usual meaning of the term, but, according to the strict letter of the law, may not be taken even to Scotland, Northern Ireland, the Channel Islands, the Isle of Man, or Eire.

When the children are out of the jurisdiction of the court at the time of the making of the order for their custody, the order may direct that they be brought within the jurisdiction immediately, or it may grant leave that they may remain out of the jurisdiction if an undertaking to bring them within it immediately it is so ordered, is given and filed.

To insure that a child is not taken out of the jurisdiction, notice of the making of an order for custody should always be given to the Passport Office. If this notice be given, no passport having reference to the child may be issued; if it be not given, the Passport Office will not enquire whether any order has been made, and will accept no responsibility in the matter.

When it is desired that a child in respect of whom an order for custody has been made, shall be taken out of the jurisdiction, an order permitting it must be obtained. There is little difficulty in obtaining this order if an undertaking to return the child to the jurisdiction whenever it is so ordered, is filed with the application. If it be desired to take the child abroad on a succession of visits (as for school holidays on the continent, or for the purpose of education in a continental school), it is not necessary to obtain the leave of the court on each occasion. A general order permitting the exit of the child may be obtained, if the usual undertaking be filed.

A breach of an undertaking to bring a child within the jurisdiction of the court whenever it is so ordered, is a very serious contempt of court, and punishable as such.

Orders of magistrates' courts

Magistrates' courts have the power to make orders relating to the custody of children, but they will not make them if proceedings are pending in any division of the High Court. If, at the time of the commencement of proceedings for divorce, there is a valid and subsisting magistrate's order, the judges of the Divorce Court will not interfere with it, unless there are peculiar circumstances which call for its variation.

How application for custody is made

When a petitioner desires that the custody of all or any of the children of the marriage be awarded to him or her, the prayer to the petition should contain a clause to that effect. If it does not do so, the application will not be considered, unless it can be shown

that the respondent has otherwise had sufficient notice of the intention of the petitioner to ask for custody. In no case will the court entertain an application relating to children unless the other spouse has had notice of it, and an opportunity to be heard.

If a respondent be desirous of having the custody of any or all of the children of the marriage, or be desirous of being heard on any application made by the petitioner, or by some other person, he or she must enter an appearance. If a general appearance has not been entered, one limited to the question of custody may be entered without leave of the court.

When a third party wishes to be heard on questions relating to custody, whether to make an application that it be granted to them, or to bring matters which have a bearing on the matter to the notice of the court, leave to enter an appearance for that purpose must be obtained.

All questions relating to the custody of children must be decided by a judge. A registrar has no jurisdiction whatsoever. It is only when there is no dispute in the matter, that an order will be made in open court on the pronouncement of a decree in the main suit. If there be any dispute which will involve argument, the application will be adjourned to a later date, to be heard in the privacy of the judge's chambers. It is not in the interests of the children that matters concerning them shall be argued in open court and in the presence of the public.

If a decree has not been pronounced in the suit, it is very rare for an order to be made removing a child from the custody of the person who has its care at the time of the commencement of the proceedings. So long as the charges in the petition remain unheard, the party against whom they are made is deemed to be innocent of them, and worthy of retaining the custody. But if the welfare of a child be jeopardized (as when it lives in unsuitable surroundings, or is subject to improper or immoral influences), an immediate order for its removal will be made.

The power of the court to make orders affecting children does not come to an end with the pronouncement of the final decree in the suit, and applications may be made at any time until the children have reached an age of discretion.

Evidence on applications concerning children

Evidence on matters affecting children is generally given by affidavit, whether it be in support or in rebuttal of the claim made. It is only in exceptional circumstances that the children are brought in person before the judge. If the judge be desirous of knowing the views and preferences of the children for one or other

of the parents, special directions will be given for their attendance before him. When that happens, he will interview them in the privacy of his own room, and without the presence of either of the parties, or of their solicitors or counsel.

Enforcement of orders for custody

When there is difficulty in obtaining the delivery of a child in respect of whom an order for custody has been made, application must be made for a special order. This must recite the order for custody that was made, and must command that the child be handed over to a named person at a specified time and place. It must be served personally on the person whose duty it is to hand over the child, for disobedience of the order is a very serious contempt of the court.

ACCESS TO CHILDREN

Unless a decree has been pronounced in a suit, all applications for access to the children of the marriage must be made to the registrar of the registry in which the cause is proceeding. This is so whether an order for custody has been made or not. But if a decree has been pronounced in the suit, all applications must be made to a judge, unless the person who has the custody of the children is prepared to grant access to them, and the only matter in dispute is the extent of the access. In those circumstances, application may be made to a registrar.

Orders for access to children are rarely general in terms. They usually specify the day and times, or the intervals at which access must be given. When necessary, an order may provide that the grant of access is conditional on the children not being brought into contact with undesirable persons, who are generally named in the order.

MAINTENANCE OF CHILDREN

At any time after the service of a petition in which the custody of the children is claimed, or at any time after making a subsequent application for custody, the following classes of persons may apply to the court for the allotment of an income for their maintenance, from either or both the parents.

1. the petitioner.
2. the respondent, after he or she has entered an appearance in the suit.
3. any person who has obtained leave to intervene in the suit for the purpose of applying for the custody of the children.

4. any person who has the care or custody of the children under an order of the court.

The power of the court to make orders providing for the maintenance of children is not confined to the making of an order against the father. If the mother be possessed of property, or be in receipt of an income, she can be ordered to contribute wholly or in part. There is a liability attaching to both parents.

The period of time for which it can be ordered that the children must be maintained can extend until they attain the age of twenty-one years. Generally, it does not extend beyond the age of sixteen, unless the education or future career of the children calls for a provision to be made after they have attained that age. To ensure that the children shall not suffer by the death of the parent who has been ordered to maintain them, there is power to order that the maintenance, or a substantial part of it, be secured by the settlement of property for that purpose. (*Post*, Chap. V, pp. 89, 95.) Security cannot be ordered for a period after a child has attained the age of twenty-one years.

An application relating to the maintenance of children may be the subject of a special application, or it may be included in one made by a spouse on her own behalf. In either case, the procedure to be followed is the same as for the making of financial provisions generally, and similar principles apply in arriving at the amounts to be paid. (*Post*, Chap. V, pp. 78, 82.)

Emergency expenses

If, after an order for the maintenance of children has been made, unforeseen circumstances call for extraordinary expenditure on their behalf, an application may be made for further payments to meet them. A circumstance of this nature would be an illness calling for abnormal and expensive medical attention.

EDUCATION OF CHILDREN

When an order for the maintenance of children is made, it may also provide funds for their education. If it does not do so, and money is required for that purpose, application may be made to a judge for a further allowance to meet the educational expenses. In determining this matter, the judge will have regard to the social and financial condition of the parents, their religions, and the abilities, welfare, and future careers of the children.

Variation of settlements affecting children

When the proposed variation of a settlement (*post*, Chap. V, p. 92) may have an effect on the future interests of children, the

court will order that they be separately represented at the hearing of the matter. A person (who may not be either of the parents), will be appointed their guardian for the purpose of the proceedings, and the guardian so appointed must instruct a solicitor (other than the solicitor acting for either of the spouses), to represent them. If necessary, the children will also be represented by independent counsel.

When a settlement which affects children is being varied with the consent of the parties to it, the proposed variation must be referred to counsel, for his opinion as to whether the interests of the children are sufficiently safeguarded.

CHAPTER V

CONCERNING FINANCE

Alimony pending Suit; Maintenance; Secured Provision; Periodical Payments; Permanent Alimony; Variation of Settlements; Settlement of Wife's Property; Compassionate Allowance; Modification Orders; Ownership of Property.

THERE ARE FORMS of subordinate relief whereby financial provisions may be made for the support of a wife, husband, or children. In granting them, the court takes into consideration the means of the parties, the circumstances of the dependants, and the facts peculiar to the case. The reliefs may not be claimed as of right, and if, after enquiry, it is shown that a financial provision is not necessary for the support of the dependants in their normal position in life, no order will be made. In such circumstances, the court may even direct that a registrar shall not proceed with an inquiry that can only be harassing and expensive.

The powers of the court are not confined to the making of orders for financial provisions, for when they take the form of money payments to be made at regular intervals, it reserves to itself the right of revising an order when the circumstances of the case, or a change in the financial position of the parties, call for it. Any order may therefore be varied or modified at any time.

Payments that may be ordered to be made, are not a form of property, and consequently cannot be assigned or released in favour of third parties. It is only in bankruptcy proceedings that part of the payments can be seized for the benefit of creditors, and that right is conditional on a sufficient income being left for the dependants in whose favour the order was made.

Nature of relief available

The nature of the financial relief available, is dependent upon the extent to which the marriage bond has been broken or loosened. There are important differences between the various forms, and regard must be had to the form of relief granted in the main proceedings when application is made. The following table sets out the financial relief that may be claimed, having regard to the nature of the relief granted in the main suit.

1. *When a suit of any nature is pending, i.e., before any final decree*	Alimony pending suit (sometimes called alimony *pendente lite*).
2. *After a decree absolute of divorce*	(*a*) Maintenance. (*b*) Maintenance of children. (*c*) Secured Provision. (*d*) Variation of Settlements. (*e*) Settlement of Wife's Property.
3. *After a decree absolute of nullity of marriage*	As in (2) excluding Settlement of Wife's Property.
4. *After a decree of judicial separation*	(*a*) Permanent Alimony. (*b*) Maintenance of children. (*c*) Settlement of Wife's Property.
5. *After a decree of restitution of conjugal rights*	(*a*) Periodical Payments. (*b*) Permanent Alimony. (*c*) Maintenance of children. (*d*) Secured Provision.
6. *After a final decree of any kind*	Compassionate Allowance (in favour of a guilty wife only).
7. *After an order for a financial provision of any kind has been made*	Modification Order.
8. *During the course of proceedings of any kind*	Decision as to ownership of property (as between husband or wife).

Parties agree out of court

There is a great saving of expense if the parties come to an agreement out of court as to the financial provisions that shall be made, for the only expenses incurred are the embodiment of the terms of the agreement in an enforceable form. The costs of harassing and expensive inquiries are avoided, and there are none

of the recriminations and displays of ill-feeling inseparable from long drawn out legal and financial investigations. It is therefore in the interests of all parties to come to an amicable arrangement whenever it is possible to do so. There is one exception to this, which arises out of a decree of divorce or judicial separation granted on the grounds of insanity. In that case, the court insists that it shall itself determine the amount to be paid. It will do so with a full knowledge of all the circumstances, and with the assistance of the Official Solicitor, who, in the great majority of cases, acts as the guardian of the person of unsound mind.

When the parties have come to an agreement as to the financial provisions to be made, there are two methods in common use, of embodying its terms in proper form, and of making them enforceable in law,—by order of the court made with the consent of the parties, and by the more common, though less desirable method of the execution of a deed.

By Consent Order

A consent order may be obtained by a simple application made by summons to a registrar of the registry in which the suit is proceeding. The summons must set out the terms of the proposed order, and be endorsed, or accompanied by a document expressing the consent of the party against whom the order will be made. If the terms of the proposed order are reasonable, and not against public policy, there is rarely any difficulty in obtaining it.

The advantage that an order gives over a deed, is that the matter is not entirely withdrawn from the jurisdiction of the court. It is therefore open for either of the parties to make application, at a later date, for a variation or modification of the order, if an alteration in the circumstances of either of them warrants it. Circumstances that would call for the review of the terms of an order might be a change in the financial position of the parties (as when the income of either of them increases or diminishes), or in their status or condition (as when the woman re-marries). As a variation or modification of the original order may be to the advantage of either party, there is no hardship involved by there being a right of review reserved to the court.

When an order of the court is not obeyed fully, the whole machinery of legal process can easily be set in motion as part of the matrimonial proceedings, to enforce obedience. All forms of execution may be levied to obtain the payment of any arrears that may have accrued, and the preliminary steps are relatively simple and inexpensive.

By Deed

A deed is the most solemn document known to the law, and immediately the parties have "signed, sealed, and delivered" it, it is unchangeable, except by the agreement of the parties to be expressed in a later deed. No court can rectify it, unless there is an evident and inadvertent error on its face, or one of the parties was under a legal incapacity at the time of its delivery. If these requirements do not exist, the actual covenants in the deed cannot be altered, and it is beyond the powers of any court to alter their terms.

It is in its unchangeable nature that the dangers of a deed lie. Covenants, which appear to be reasonable at the time of the execution of the deed, may become burdensome and oppressive at a later date. Circumstances may have altered the financial position of either or both of the parties, and it may well be that the sum originally agreed to be paid, although equitable at the time of the delivery of the deed, may become impossible of payment, or insufficient in amount. If the terms of the deed make no provision for these possibilities, and the parties cannot agree to their variation, bankruptcy or penury may result. The only virtue that a deed may have, is that it can give permanence to matters which it is desired shall be placed beyond further question, and so prevent future evasion or equivocation. It is for this reason that the court sometimes orders that its decisions shall be embodied in a deed to be executed by the parties.

Of course, a deed may be so worded as to provide all that an order of the court can supply, and if it does so, no valid objection can be made to it. But whatever its terms, parties who intend to enter into a deed, should seek independent legal advice before executing it, if only as a measure of precaution. The advice of the legal adviser of the opposite party should never be taken, for it is in his interest that he should make the best possible bargain for his client.

When it becomes necessary to enforce obedience to the covenants of a deed, a separate action to obtain judgment upon it, must be commenced. It rarely can be enforced in the court in which the matrimonial proceedings were taken. When judgment has been obtained, it can only be enforced by the court which gave the judgment.

PAYMENT OF LUMP SUM IN LIEU OF MAINTENANCE OR ALIMONY

There is no power in the court to order that a lump sum be paid in lieu of maintenance or alimony. But if the parties agree

that this shall be done, it may be arranged by the execution of a deed, or by a consent order of the court. If a consent order be desired, the application must be made to a judge, who, if he is satisfied that the arrangement is fair and equitable, may approve of it.

There are great risks attaching to the payment of a lump sum in lieu of maintenance or alimony, for the wife may be extravagant, or reckless in investment, and so lose the capital sum. On the other hand, the circumstances of the husband may so improve as to make the sum agreed upon and paid, out of proportion to his later means.

An arrangement of this nature may possibly be advantageous when a husband habitually falls in arrears in his payments under an order or deed, and proceedings to recover the arrears have constantly to be taken. But even in these circumstances there is a risk, for if the order or deed under which the payments were made originally, was discharged on receipt of the lump sum, the matter cannot be re-opened by the court, and there is no jurisdiction to make a further order for maintenance.[1]

On an application to discharge an order on the receipt of the lump sum agreed to be paid in place of the payments under the order, the court has no power to discharge that part of the order that may provide a secured provision for the wife.

ORDER OF A MAGISTRATE'S COURT

If there be an order of a magistrate's court providing for the maintenance of a wife, it does not come to an end when proceedings are taken in the divorce court, nor does it prevent the divorce court making an order for the same purpose. If it be intended to apply for an order for maintenance in the divorce court, the proper course is to obtain the discharge of the order from the magistrate's court which made it.

PROCEDURE

The procedure to be followed is practically the same for applications for all forms of financial relief, except when an order for alimony pending suit is sought. For that form of relief, there is an alternative procedure, which takes the form of asking for it in the prayer to the petition. When this course is followed, the notice that is endorsed on the copy of the petition that is served on the husband must be extended by further calling upon him to file an affidavit giving full particulars of his property and income.

[1] Mills *v.* Mills (1940) 84 Sol. J. 253.

Application for all other forms of financial relief (including one for alimony pending suit when it is not made in the prayer to the petition) is made by the filing and service of a formal notice of the application. This notice must call upon the person served with it, to enter an appearance limited to the claim (unless an appearance has already been entered in the main suit), and to file an affidavit giving full particulars of his property and income. The stage of the proceedings at which this notice is filed, depends upon the nature of the relief claimed, and is dealt with in the paragraphs dealing with each particular form of relief.

When a party to a marriage claims any form of financial relief personal to her, she may include in it one relating to the maintenance of the children of the marriage. It is at the option of the claimant to make a separate application on behalf of the children, or to include it in a claim for personal relief.

Evidence in support or rebuttal of claim

In order that the court shall have the fullest knowledge of the financial position of the parties, each of them must file an affidavit giving particulars of their property, capital, and income. Copies of these affidavits must be delivered to the opposite parties, and they form the main documents upon which the enquiry will be based. If either party consider that they are insufficient or evasive, further and fuller affidavits may be demanded. If these are still considered insufficient or evasive, both parties may be ordered to disclose upon oath all documents that relate to their property and income over a period of years (usually three years), and to give facilities for the inspection of such of those documents as either party may desire to examine. In addition, an order may be obtained for the inspection of their banking accounts, and if need be, a party may be ordered to attend before a registrar for the purpose of being orally examined as to his or her means. By these processes, the allegations and denials of both parties may be examined, and so established or rebutted.

If a party against whom a claim is made, neglects or refuses to give information as to his means, an order may be obtained compelling him or her to do so. Disobedience to such an order is a contempt of the court.

The Inquiry

When it seems that all the information that can possibly be obtained has been filed, application must be made for an appointment before a registrar for the examination of the claim. Notice of this appointment must be given to the opposite parties,

and, when the main proceedings are based upon unsoundness of mind, to any public authority to which the respondent may be chargeable.

If the opposing party has not filed any evidence as to property, capital, or income, and no steps have been taken to compel that to be done, the inquiry will be based upon the information contained in the affidavit of the party making the claim. Any injustice that may arise from this, is the fault of the party who, having had the opportunity of filing evidence in disproof of the allegations made, has neglected or refused to do so.

Obviously, if the party against whom the claim is made, has no income, or is a bankrupt, no order can be made. But the mere fact that he or she is living on a voluntary allowance, does not of itself prevent an order. If it be considered that the allowance will continue despite any order made, it will most certainly be made.

It is the nett income of the parties that forms the basis of the order. The expenses incurred in earning the income, or in the maintenance of the property or capital that produces it, are therefore deducted first of all. Tools of trade, and stock in trade, are a means of producing an income, and so their capital values are not taken into consideration. Charges on income are a permissible deduction, as also any part of the income which, by the terms of a partnership agreement, must be re-invested in the business.

When either party possesses valuable property which is not income producing, the income that would arise were the market value of the property invested, is treated as income actually received. So that if a party has valuable jewellery, or a valuable collection of rare articles, its value is estimated, and the income that would arise were that sum invested in income bearing securities, is taken into account. Similarly, where either party has a reversionary interest in property (as when he or she is entitled to it on the death of some other person), the value of the interest at the date of the inquiry is calculated in accordance with the usual actuarial tables, and the income that would be produced were that sum invested in income bearing securities, is treated as part of the income of that party.

Where one of the parties is in receipt of pay and allowances, the allowances are not taken into consideration if they are wholly expended upon the purposes for which they were given. But if they be allowances of which it can be held that part constitute pay, that part will be considered as income, for the purpose of arriving at the total income of the person concerned.

If, at the time of the inquiry, the person against whom an

order, is claimed, nas only a small income, or no income at all, but there is a possibility of conditions improving at some future date, an order may be made for a nominal sum. This is done in order to keep alive the rights of the applicant, so that when conditions improve, a modification order, increasing the nominal sum to one more in keeping with the new conditions, may be obtained.

THE ORDER

When the registrar has satisfied himself as to the capital, property, and income of each of the parties, he will proceed to the consideration of the amount to be allotted.

Conduct of the parties

Except when alimony pending suit is being applied for, the conduct of the parties during the subsistence of the marriage must be taken into account. This cannot be done on an application for alimony pending suit, for the charges in the petition have not yet been adjudicated upon, and any matters that may arise out of them, must not be prejudged. But if a decree has been pronounced, allegations may be made by one party against the other, even though they are such as might have been made in the main suit, and were not so made. Such allegations must be within reason, and there are definite limits placed upon them. For instance, nothing may be alleged which had been brought forward during the hearing of the petition, for it has already been adjudged. So that a husband may not accuse his wife of adultery by casting doubts on the paternity of a child, for the paternity has already been accepted in the main suit. If he raises the issue of adultery in some other manner, it is a matter of such first-rate importance that it must be referred to a judge for formal hearing.

In the generality of cases, the type of allegation that is made, relates to the capacity of the wife as a wife,—neglect of family duties, extravagance, loose conduct not amounting to adultery, and the like. Proof of allegations of this nature may not have the effect of preventing an order being made, but may affect the amount ordered to be paid.

If a wife has re-married, or is about to re-marry, that circumstance is considered as an additional asset improving her financial position. The extent to which she improves her position thereby is therefore reflected in the amount ordered to be paid.

Assessing the allowance

There is no strict arithmetical rule for the ascertainment of the amount to be paid. The main principle to be followed is to

arrive at an amount having regard to the incomes and the station in life of the parties. When dealing with people of average means, the application of this principle has brought into existence a rough and ready rule of almost universal application. It is, that where an order for alimony pending suit is being made, the amount is fixed at a sum which will bring the income of the applicant up to about one fifth of the joint incomes of the parties; that in other forms of relief, which are generally on a more permanent basis, the amount is fixed at a sum which will bring the income of the applicant up to about one third of the joint incomes of the parties. The lesser allowance awarded on an application for alimony pending suit, is justifiable by the fact that the urgency of the application does not permit of an exhaustive inquiry into the means of the parties. By fixing the amount at one fifth of the estimated joint incomes, there is less risk of an injustice being done to either of the parties.

The rule does not apply when the incomes are very large, for other considerations have to be taken into account. A person in receipt of a vast income has responsibilities in addition to those to his wife and children. Among these may be mentioned the upkeep of establishments and their staffs, and charitable and philanthropic gifts. The rule followed in such cases, is that an amount must be fixed which is sufficient to maintain the wife in the position in life to which she is entitled as the spouse of the respondent. The amount of the allowance therefore resolves itself into the question as to what would be an adequate and sufficient portion, if the applicant had become the widow of the respondent. This, of course, depends upon the mode of life of the parties. Decided cases go to show that where the income of the husband is in the region of £25,000 per annum, the amount of the allowance ordered to be paid has varied between £3,500 and £5,000.[1]

INCOME TAX

The present high rates of income tax and surtax make the question of their incidence upon sums to be paid under an order or agreement, one of very great importance. It must be borne in mind that all payments form part of the income of the recipient, and are taxable as such. The usual arrangement is that the parties are assessed separately, and are each liable to tax as single persons. They can therefore only obtain the reliefs that would be granted to them were they actually single persons.

Sums paid for the maintenance and education of children are,

[1] Hulton *v.* Hulton (1916) 1 P. 57; Gilbey *v.* Gilbey (1927) P. 197.

for the purposes of income tax, deemed to be the income of the parent who has their custody. Both parents may not now obtain the reliefs that are allowed in respect of them, and so the apportionment of those reliefs becomes a matter of agreement between them. In default of agreement, the local inspectors of taxes will apportion them in proportion to the amount or value of the provision made by them respectively for the benefit of the children.

A husband who is liable to pay surtax, may take into account the gross amount that he pays under an order or agreement and upon which he has paid income tax, as a deduction in assessing his liability to surtax.

Tax payments on small weekly sums

Before dealing with the question of income tax generally, it will be more convenient to deal first of all with the concession that is granted in respect of income tax due on small weekly sums payable under an order. It is important to note that the concession is applicable only to payments made under an *order*, and does not apply to payments made by the agreement of the parties. In those cases, the usual arrangements as to the payment of income tax apply.

The legal obligation to pay income tax at the standard rate before the payment of sums of money, causes much inconvenience both to the public and to the inland revenue authorities when claims for repayment are made. Parliament has appreciated these difficulties, and has allowed a special concession when small sums are payable *weekly under an order of any court of the United Kingdom.*[1] When the payment is for the benefit of a woman and does not exceed £2 per week, or is for the benefit of a child under the age of sixteen years and does not exceed £1 per week, the payments must be made in full without deduction of tax. The payor is entitled to relief in respect of them, and they may be deducted from his income for the purpose of assessment for income tax, in the same manner as he deducts other charges on his income, such as, bank or mortgage interest. But the payments still remain part of the income of the wife, who is liable for income tax at the rate appropriate to her total income.

This concession applies to all small maintenance payments under an order made after the 15th July, 1944, or if the order were made before that date, to all payments falling due after the 5th April, 1945.

All other payments of money, whether under an order or by agreement, generally provide that they shall be paid "less tax",

[1] Finance Act, 1944, S. 25.

or "free of tax". Sometimes, the question of the payment of income tax is not mentioned at all. Each of these situations calls for careful examination.

"Less tax"

When an allowance is to be paid "less tax", the husband first pays income tax at the full standard rate, on the whole of his income, without regard to what he has to pay to his wife. He may then either deduct the amount of the tax from the sums paid to the wife, or he may pay her the full amount mentioned in the order or agreement.

When the first course is followed, the husband must give to the wife the usual certificate of the deduction of income tax, and of its payment to the collector of taxes. This certificate will be a set-off against the tax payable by her, and she may obtain its repayment, wholly or in part, as her own liability to income tax allows.

If the second course be followed, the husband may be entitled to repayment of tax on the basis of the wife's income and reliefs, unless the latter are exhausted by any other income that she may possess. This is a concession allowed by the inland revenue authorities, and cannot be demanded as a right.

"Free of tax"

This phrase is equivalent to the more common phrase which provides for the payment of "such sum, which, after the deduction of tax, will amount to the sum of £...". The effect of both phrases is that income tax is not paid upon the sum mentioned, but upon the sum, which, after the payment of tax at the standard rate, will leave the sum mentioned or deemed to be mentioned, in the order or agreement. The result is that where the standard rate on income tax is 9/- in the £, the payment of an allowance of £198 per annum "free of tax", calls for the "grossing up" of that sum for the purpose of the assessment of income tax, to £360. Income tax is paid by the husband on that latter figure at the full standard rate, so that the wife gets £198, and the inland revenue authorities £162. The wife may then reclaim so much of the tax paid, as her other income and reliefs allow.

When the standard rate of income tax was increased to the unprecedented rate of 10/- in the £, and a corresponding increase made in the rates of surtax, a very serious situation arose with regard to payments to be made "free of tax". The person called upon to pay, was confronted with a burden of tax that had never

been anticipated or imagined when the order or agreement was made. In many cases, where the payments attracted surtax as well as income tax, the payments were a practical impossibility. The legislature appreciated the difficulties, and it was enacted, that where a "tax free" order or agreement was made *before the 3rd September, 1939, and had not been varied*, special provisions should apply.[1] The effect of these provisions was, that the payor should pay income tax at the standard rate in force before the 3rd September, 1939 (i.e., at 5/6 in the £), and that the payee should pay income tax at the excess of the current standard rate over 5/6 in the £. This was effected by enacting, that for the sum mentioned in the order or agreement, there should be read a fraction of that sum, the denominator of which would be 29, and the numerator 29 less 1 for every sixpence the current standard rate of income tax exceeded 5/6.[2] At first sight this appears to be a complicated operation, but it is not so if a concrete example be considered.

Example :—By an order or agreement made before 3rd September, 1939, and which has not since been varied, a husband is called upon to pay to his wife the annual sum of £290 free of tax. For this sum there must be read an amount equal to 22/29ths of it. (The fraction is arrived at in the following manner,—the denominator, 29, is a constant; the numerator, 22, is obtained by the deduction from 29, of 1 for every sixpence the current standard rate of income tax exceeds 5/6 in the £., i.e., at the present rate, 9/- — 5/6 = 3/6, or 7 sixpences; 29 — 7 = 22.)

The effective order has therefore to be read as being that the husband must pay to his wife the sum of 22/29ths of £290, i.e., £220. This latter sum is "grossed up" on the basis of tax at the rate of 9/- in the £, and so becomes £400. The husband pays income tax at that rate on that sum, so that he pays £180 income tax, leaving the sum of £220 to be paid to his wife.

Since the wife only receives the sum of £220 in place of the £290 originally ordered or agreed, she has actually paid £70 towards the income tax. The effect is therefore that the husband, on the basis of the amount provided by the original order or agreement, pays in income tax the sum of £110, and the wife the sum of £70. These sums work out at the respective rates of 5/6 and 3/6 in the £.

A similar principle applies to the payment of surtax, with the exception that the husband pays at the rate of surtax in force for the financial year 1937-1938, and the wife at the rate of the increase of surtax since that year.

[1] Finance Act, 1941, S. 25. [2] Finance (No. 2.) Act, 1945, S. 20.

As to the repayment of income tax, if the other income and reliefs of the wife permit of it, she may obtain repayment of the whole or part of the tax paid.

No mention of tax

When an order or agreement makes no mention of how the tax is to be paid, the position is similar to that when it is provided that the payments shall be made "less tax". (*Supra*, p. 84.)

APPEAL FROM ORDER

A party who is dissatisfied with any order that has been made, may appeal to a judge within five days of the making of the order. The fact that an appeal has been lodged, does not stay the order, and payments under it must be made from the day appointed, despite the notice of appeal that has been given.

ALIMONY PENDING SUIT

Alimony pending suit is the form of financial relief that may be obtained while proceedings are pending, that is to say, from their commencement down to the pronouncement of the final decree.

Who may apply, and when

The persons who may make application for alimony pending suit are—

1. a *wife* who is a petitioner for any form of relief;
2. a *wife* who is a respondent in any suit brought against her by her husband, and in which she has entered an appearance;
3. a *husband* who is the respondent to a petition for divorce or judicial separation brought against him on the ground of his insanity.

A wife petitioner may make application at any time after the filing of the petition in the main suit; a wife or husband respondent, after having entered an appearance in the suit.

Extent of order

The order must be made before the final decree has been pronounced in the suit, except when the suit is for restitution of conjugal rights, when it may be made at any time up to the last day appointed for obedience to the decree. That day is usually fourteen days after the decree has been pronounced.

In normal cases, the order provides for the payment of the allowance from the date of service of the petition in the main suit. The payments extend throughout the continuance of the proceedings, and,

(a) when the proceedings are for divorce or nullity of marriage, up to decree absolute, unless the order is for the benefit of a wife who was unsuccessful in the suit. In that case, the payments cease when the decree *nisi* is pronounced, or the petition is dismissed, unless in the special circumstances of the case, it is otherwise ordered;
(b) when the proceedings are for judicial separation, up to the date upon which the decree is pronounced, or the petition is dismissed;
(c) when the proceedings are for restitution of conjugal rights, up to the last day of the period within which the decree is ordered to be obeyed, or up to the day upon which the petition was dismissed.

If it is intended to appeal against the grant or refusal of a decree, application may be made to a judge for the extension of the order until the hearing of the appeal.

An order usually provides for the payment of any arrears that may have accrued since the date from which it came into operation. According to the urgency of the case and the circumstances of the payor, the arrears may be ordered to be paid in a lump sum, or by instalments.

MAINTENANCE

Maintenance is the more permanent form of financial relief that may be obtained after a decree absolute of divorce or nullity of marriage.

Who may apply, and when

It may be applied for by—

1. a *wife*, who has presented a petition for divorce or nullity of marriage, at any time after the time limited for the entry of appearance in the suit has expired;
2. a *wife*, who is respondent to a petition for divorce or nullity of marriage, at any time after she has entered an appearance to the petition;
3. a *husband*, who is respondent to a petition for divorce or nullity of marriage on the ground of his insanity, at any time after an appearance has been entered to the petition on his behalf.

Application may not be made later than one month after a decree absolute has been pronounced in the suit, unless a judge grants leave to do so.[1] This leave will not be granted unless the

[1] The Denning Committee has recommended that this limitation of time be abolished.

application is made within a reasonable time. What amounts to a "reasonable time" is dependent upon the facts of the case, but, if there be no good excuse for the delay, the application will be refused.

Extent of order

No order may be made before a decree *nisi* has been pronounced in the suit. If one be made in the period between decree *nisi* and decree absolute, it does not come into force unless and until a decree absolute is pronounced.

The usual order provides that the payments shall be made "as from the date of the decree absolute, during joint lives and until further order". It provides for the intervals of payment, and for the payment of arrears, if any have accrued. Credit is always given for any payments that may have been made in anticipation of the order. Since the order is in force during the joint lives of the parties only, it ceases to be operative on the death of either of them. When the payor dies, there is no right against his estate, nor a cause of action against his executor or administrator.[1] The only manner in which payments may be ensured after the death of the payor, is by obtaining an order for a secured provision. (*Infra*, p. 89.)

Report on maintenance

There are rare occasions when a registrar may refuse to take the responsibility of making an order for maintenance, or the parties may ask him not to do so, on account of the serious issues involved. In such cases, he will hold an inquiry, and embody his findings and recommendations in the form of a report. This is filed, and then brought before a judge for its confirmation or variation.

PERIODICAL PAYMENTS

Periodical payments are the form of financial relief that may be obtained after a decree of restitution of conjugal rights has been granted, but not complied with.

Who may apply, and when

Application may be made by—

1. a *wife* in whose favour the decree was made;
2. a *husband*, in whose favour the decree was made, provided that he can show that his wife possesses property, either in

[1] Dipple *v.* Dipple (1942) 86 Sol. J. 70.

possession or reversion, or that she is in receipt of profits of trade, or earnings.

Application may only be made after the expiration of the time within which it has been ordered that the decree must be obeyed. This period is usually fourteen days after the date of service of the decree upon the respondent. Although there is no time limit within which an application must be made, delay always calls for an explanation. If there be considerable delay, and no reasonable excuse therefor, no order will be made.

Extent of the order

The order is usually expressed to be in force "during joint lives and until further order". The payments date from the last day upon which the respondent should have complied with the decree.

When an order is made on the application of a husband, the payments may be for his benefit and of the children of the marriage, or of either or any of them.

A secured provision may be obtained in place of periodical payments, or part of the payments ordered to be made, may be the subject of a secured provision. (*Infra.*)

SECURED PROVISION

A secured provision, in its more usual form, may be defined as the compulsory provision of a fund to be vested in trustees, for the purpose of ensuring the payment of sums of money over a specified period of time. When the payments are in respect of a spouse, this period of time is usually for life; when payable in respect of children, it is up to a specified age, which may not exceed twenty-one years.

The provision may only be made when there are children concerned, or when an order for maintenance or periodical payments in favour of a spouse may be obtained, i.e., after a decree absolute of divorce or nullity of marriage, or after a decree of restitution of conjugal rights. It may not be obtained after a decree of judicial separation, when the only form of financial relief available, is permanent alimony.

It is open for a party to apply for an order providing for a secured provision alone, though the more usual course is to apply for it in addition to an order for maintenance or periodical payments. If the first course be followed, the income obtained will be less than would be obtained under an order for maintenance or periodical payments, for a grant of a secured provision involves the tying up, or freezing of property or capital. The second

course is the more advantageous, for it ensures a larger income during the lifetime of the payor, and the provision of a smaller income after his death. After the death of the payor, there is a right of action against his estate, if there be default in the payment of the income ordered to be secured.

Who may apply, and when

Application may be made by the same classes of persons as may apply for maintenance of children, maintenance, or periodical payments. It must be by notice served on the party that it is desired shall provide the security, within the period prescribed for such applications. The notice may be a special one for the purpose, though it is more usual for it to form part of the notice for maintenance or periodical payments. Whichever course is followed, both the applications must be dealt with on the same occasion, for there is no jurisdiction in the court to make one kind of order at one time, and the other at another time. The matters are too interlocked to allow of separate orders.

Since the object of a secured provision is to give permanence to the financial arrangements between the parties, it must be secured by deed. The terms of the deed are a matter of arrangement between the parties, but if they cannot agree, they must be referred to a conveyancing counsel of the court for settlement.

The property secured

The property that is specified in the deed as being the security to be provided, depends upon the assets of the person against whom the order is made. It may comprise houses and land, or stocks and shares. It may even comprise insurance policies on the life of the person ordered to provide the security. These policies must be assigned to the trustees, and the assured must covenant to pay the premiums upon them as and when they fall due. When the only assets are floating assets, and for business reasons it is not advisable that they should be converted into assets of a more permanent character, it may be agreed, or ordered, that a personal covenant for the payment of the allowances be entered into. If there be default in payment, action may be taken upon the personal covenant.

If after an order for a secured provision has been made, but before the deed has been executed, the person ordered to provide the security proceeds to part with his assets in order to nullify the projected deed, an injunction may be obtained to restrain him from dealing with them before the deed is executed. But if an order has not been made, no injunction may issue. A husband

provision has been made, may therefore settle all his property on his second wife, and by so doing, defeat any order that may afterwards be made.[1]

Where after a deed has been settled and prepared for execution, any party to it neglects or refuses to execute it, application may be made to a judge for an order that a registrar executes it on behalf of the person in default. If a registrar executes the deed on behalf of that person, it is as binding upon him as though he had personally executed it.[2]

Once the deed has been executed, it is final, and cannot be reviewed unless there is an evident error or mistake on the face of it. The court cannot review it on any other grounds. It is equally binding on the party who provides the security, as on the party who obtains the financial benefit from it. If, by the terms of the deed, the security provided is to be the source of the income, there can be no recourse elsewhere in the event of a failure of income. The party in whose benefit the deed has been entered into, must look to it alone to provide the income. If it cease to yield the anticipated income, the person providing the security cannot be called upon to make up the deficiency.[3]

PERMANENT ALIMONY

Permanent alimony is the form of financial relief that may be obtained after a decree of judicial separation, or of restitution rights, has been made.

Who may apply, and when

It may be applied for by—

1. a *wife* on whose application the decree was made;
2. a *husband* against whom a decree of judicial separation has been made on the ground of his insanity.

Application may be made at any time after the decree has been pronounced in the suit. Although there is no time limit within which an application must be made, considerable delay without reasonable cause, is usually a bar to the making of an order.

Extent of order

The usual form of order is, that the payments must be made "out of present income and until further order". The payments

[1] Jagger *v.* Jagger (1926) P. 93.
[2] Supreme Court of Judicature (Consolidation) Act, 1925, S. 47.
[3] Shearn *v.* Shearn (1931) P.1, per Hill J. at p. 4.

generally commence from the date of the pronouncement of the decree in the suit.

It is important to note that an order for a secured provision may not be obtained when permanent alimony is ordered to be paid.

VARIATION OF MARRIAGE SETTLEMENTS

A decree of divorce, or of nullity of marriage, may often have an adverse effect upon established interests of the innocent spouse, or of the children of the marriage. The power to vary marriage settlements is therefore a means whereby such interests may be protected, but they may not be varied further than is necessary for that purpose. The power of the court is not intended to be a means of punishment of the guilty party.

Who may apply, and when

Application may be made by either party to the marriage. If the applicant be the petitioner, it may be made at any time after the time for the entry of appearance to the petition has expired; if the applicant be the respondent, at any time after appearance has been entered to the petition. It may not be made later than one month after the decree absolute has been pronounced in the suit, except by leave of a judge. When the applicant is the person against whom a decree has been made, there must be special circumstances before a settlement will be varied to his or her benefit.

Application may also be made on behalf of the children of the marriage, if they are interested in any way under the settlement. Whether an application is made on behalf of children or not, if the proposed variation is likely to have an adverse effect on the interests of children, the registrar may order that they be separately represented before him, and that a guardian for that special purpose be appointed to represent them.

What constitutes a settlement

The statute which gives authority to the court to vary a settlement, provides that both ante-nuptial and post-nuptial settlements made on the parties whose marriage is the subject of a decree of divorce, or of nullity of marriage, may be examined.[1] It therefore follows that it is only settlements which refer to a contemplated marriage, or to one already contracted by the parties, that can be varied. The settlement must be one that takes effect upon them in their capacity as man and wife, and is

[1] Supreme Court of Judicature (Consolidation) Act, 1925, S. 192.

intended to remain so, so long as they stand in that relationship to each other.

The widest interpretation is placed upon the term "settlement", and it is not confined in its application to strict or formal settlements. There is little difficulty with ante-nuptial settlements, for they are those expressed to be made in anticipation of the marriage of two specified persons, and which take effect on the solemnization of that marriage. They do not include those made in contemplation of the marriage of a person generally, and not with a particular person. Such settlements cannot be varied in the divorce jurisdiction. It is immaterial who supplies the funds that go into the settlement, and settlements, the funds of which are provided by persons other than the parties to the marriage (as when they are put up by their respective families), may be varied.

It is with post-nuptial settlements that the greatest difficulties arise, but even upon these, the most liberal interpretation is placed. It has been held, that provided the settlement is one that has been made "for the financial benefit of one or other, or both of the spouses, as spouses, and with reference to their married state", it can be varied. Its particular form does not matter.[1] This wide acceptance of the term has permitted transactions of the following nature to be deemed settlements which the court can vary,—a power of appointment exercised by a wife so as to give an annuity to her husband on her death; a deed of separation between the parties, which does not provide that it shall come to an end with the dissolution of the marriage, or on the remarriage or proof of the unchastity of one of the parties; the purchase of a house by the husband in the joint names of himself and his wife.

But an absolute disposition of property does not constitute a settlement. So that an out and out gift cannot be interfered with, even though it were made on account of the relationship of man and wife. Thus, where one spouse purchases an annuity to be payable to the other, or purchases property in the name of the other, those transactions are complete in themselves, and are not settlements.

Extent of variation

As has been previously mentioned, a settlement will not be varied further than is necessary for the justice of the case. The guilty party will rarely, if ever, be deprived of all rights under the settlement. A number of factors must always be taken into consideration. The chief of these is an endeavour to place the injured party and the children of the marriage in as good a

[1] Prinsep *v.* Prinsep (1929) P. 225, per Hill J. at p. 232.

position as they would have been, had the marriage not been broken up. It is impossible to achieve this entirely, but after consideration of the conduct of the parties, of their income in relation to their actual requirements, and of their respective contributions (or the contributions of their respective families) to the funds comprised in the settlement, a fair and equitable variation may be determined. It therefore follows that variations cannot be the subject of a fixed rule, but must always be dependent upon the facts of a particular case. As a general principle, it can be taken, that where funds have been brought into a settlement by the petitioner, the interests of the respondent will be extinguished as though he or she were dead; if they were brought in by the respondent, the income arising therefrom will be payable for the benefit of the petitioner and of the children of the marriage, provided always, that if the respondent be the wife, a sufficient income is left to maintain her on the scale to which she has been accustomed to live. Where a settlement confers powers of appointment on one or other of the parties, their exercise may be postponed, or even extinguished altogether, if the circumstances make that course just and proper. If the guilty party has the right to appoint new trustees, the right may be extinguished altogether.

The variation of a settlement as it affects the income arising from the trust funds, is subject to a simple rule. Before the date of the order, the income is payable in accordance with the terms of the original settlement; after the date of the order, in accordance with the terms of the settlement as varied by the order.

The order

The registrar who examines an application to vary a marriage settlement, makes no order on it. He sets out all his findings and recommendations in the form of a report. This is filed, and application for its confirmation or variation made to a judge. If application be made to vary the report, notice of that application, setting out in detail the variations that it is desired shall be made, must be given to the opposite parties. The matter will then be determined in open court, and an order made.

No order will be made unless a decree *nisi* has been pronounced in the suit, and any order made, will only take effect, if and when a decree absolute is pronounced.

SETTLEMENT OF A WIFE'S PROPERTY

The power to make a settlement of a wife's property arises (a), after a decree of divorce or of judicial separation has been pro-

nounced on the ground of her *adultery*, *desertion*, or *cruelty*, or (b), a decree of restitution of conjugal rights has been made against her.[1]

The settlement may be in favour of the husband and of the children of the marriage, or of any or either of them. The property to be taken into settlement may be either in possession or reversion.

When the proceedings are for divorce, a petitioner may apply at any time after the period limited for the entry of appearance to the petition has expired; a respondent, after appearance has been entered in the suit. When the proceedings are for judicial separation, or for restitution of conjugal rights, the application may not be made until a decree has been pronounced.

Extent of order

The main consideration of the court in ordering the settlement of the property of a wife, is the effect that the proceedings have had on the financial position of the husband, and on the children of the marriage. The power to order a settlement is not intended to be a means of punishing a wife, nor of punishing a co-respondent through the wife. It is aimed at merely redressing any financial wrongs that may arise from the withdrawal of the wife and her property from the common home. With emphasis on that consideration, the principles followed are similar to those which apply when it is sought to vary a marriage settlement (*supra*, p. 92), and a similar procedure applies.

COMPASSIONATE ALLOWANCE

A compassionate allowance is one that can be granted to a guilty wife for her maintenance. It cannot be demanded as a right, and the granting of it is entirely within the discretion of a judge.

In the majority of cases, the making of a compassionate allowance is a voluntary act on the part of the husband, though, as has been previously mentioned (*ante*, Chap. II, p. 48), a decree in a suit may be granted on the condition that the husband makes a financial provision for the maintenance of his wife. This may take the form of the husband undertaking to do so, or the decree may be expressed to be subject to a proper provision being made in legal form. In the former case, it is only necessary that the undertaking should be mentioned in the decree. If there be a breach of it, an order will be drawn in its terms without further hearing of the matter, or the breach may be held to be a con-

[1] Supreme Court of Judicature (Consolidation) Act, 1925, S. 191, as amended by the Matrimonial Causes Act, 1937, S. 10(3).

tempt of court. When the provision has to be made by a legal document to be executed by the husband, no application to make the decree *nisi* absolute will be accepted, except on proof that the document has been executed, and is in operation.

If the question of a compassionate allowance were not dealt with at the time when the decree *nisi* was pronounced, and the wife desires to *compel* the husband to pay her an allowance, she must first of all obtain the leave of a judge to make the application.

Limitations on the order

When an order for a compassionate allowance is made, it is usually expressed to be in force *dum sola et casta vixerit*, which means, that it is to be in force only so long as the wife remains unmarried, and leads a chaste life. On her re-marriage, or on proof of her unchastity, the order becomes void, and ceases to have effect.

MODIFICATION ORDERS

A modification order is one that discharges, modifies, or temporarily suspends an order providing for financial relief. The term "modify", includes an increase or decrease in the amount provided by the original order. Application for a modification order may be made at any reasonable time after the making of the original order.

If the original order were made on a consent summons (*supra*, p. 76), and the proposed modification is also consented to, a further consent summons may be taken out, at the hearing of which, the old order will be discharged and a new order made.

If the original order contains the phrase "liberty to apply", the original application may be restored to the registrar's list, without the filing of a formal notice of application. Notice of the intention to restore the original application must, of course, be given to the opposite party.

In all other cases, a formal notice of the application must be filed in the registry in which the suit proceeded, and the matter must follow the usual procedure as for an original application for financial relief. (*Supra*, p. 78.)

Ownership of property

If there be a dispute between a husband and wife *who are parties to proceedings in the divorce court*, as to the ownership of property, the matter may be decided by a judge as part of the divorce proceedings. But application must be made before a final decree has been pronounced in the suit. If this requisite be present, the actual

hearing of the matter may take place after the pronouncement of the decree; if it be not present, the divorce court has no jurisdiction, and proceedings must be taken in the King's Bench Division of the High Court.

When such an application comes before a judge for the first time, it is usually referred to a registrar for inquiry and report. When the report has been drawn up and filed, the application to the judge may be renewed, for the purpose of the confirmation or variation of the report.

CHAPTER VI

CONCERNING COSTS

Paying Cases; Poor Persons; Members of the Forces

IN RECENT YEARS, the costs of divorce proceedings have been the subject of much discussion in the press and elsewhere. The discussions usually culminate in much undeserved criticism of the legal professions, without the emergence of constructive proposals to remedy the situation. The subject breaks out periodically, and is usually centred on a particular bill of costs which has been presented to someone, and which everybody is expected to deem excessive and exorbitant without any knowledge of the facts of the case. The truth of the matter is, that no rule, let alone a fixed rule, can be evolved to govern the incidence of costs in matrimonial matters. They can only be determined by the facts of the case, for the method of handling it, and the expenses incurred, are entirely dependent upon its surrounding circumstances. These differ very greatly, for not only may the provable facts differ in their nature and complexity, but the temperaments and dispositions of the parties often give rise to situations which can only be met by considerable expenditure.

The conclusion, therefore, is that no criticism of the costs of a particular case is possible without the fullest knowledge of the facts of that case, and of the behaviour of the parties. In examining this conclusion, it should be borne in mind that it is the statement of one who has had ample opportunities of studying the question from an independent and disinterested point of view, and who has never had any financial interest in the profits of matrimonial litigation.

In a very great number of cases, the application of common sense would have the effect of reducing costs to an appreciable

extent. It is amazing how pique, a desire to annoy, or a deliberate intention to be awkward or difficult, can so increase the items of a bill, that the total becomes an astonishing figure. There is the case of the husband, who has knowledge that a petition has been presented against him, but deliberately evades service. If he knows that an attempt is to be made to serve it upon him, he makes a point of not being available, or of not being at a place where it is likely that he could be found. This can go on time after time, until, in extreme cases, it may be necessary to obtain an order for substituted service, followed by expensive newspaper advertisements. When the suit is over, and he receives the order for costs that has been made against him, his reaction is a tirade against the iniquity of the costs of litigation, and a fulmination against the rapacity of the legal professions. Whereas, the truth of the matter is, that if he had exercised a little thought, he would have realized that service of the petition upon him was inevitable, and that if his guilt were established in the suit, he would have to pay the costs of the proceedings. His evasion of service has increased those costs, and undoubtedly accounts for a considerable portion of them. Process servers do not work for nothing, and each attempt that they make to serve the petition has to be paid for. There are also the expenses of the witnesses, who have to be present at the service of the petition for the purpose of identifying him. The increase of costs caused by abortive attempts at service could be avoided by the acceptance of the fact that some form of service is inevitable, and by the granting of facilities for it to take place in a quiet and unobtrusive manner.

Applications for financial relief often cause a big rise in a bill of costs. On the one hand, there is the husband who does not desire to disclose the extent of his property and income; on the other, there is the rapacious wife who is out to get every penny she can. Either situation can be reflected in the bill of costs. Evasion and non-disclosure call for applications for expensive processes, and for repeated adjournments of the inquiry. The services of accountants, or other specialists may be necessary. Of course, there are a great number of cases where all these expenses cannot be avoided, but there are likewise many in which they could. If the husband realises that an allowance will have to be paid, and the wife, that the object is not the extraction of the last penny, but a just and equitable arrangement, there is a greater likelihood of an amicable settlement. Much expense and mental worry could be saved by the common-sense method of a conference of the legal advisers of the parties. Most wives have a fairly shrewd idea of the property and income of their husbands, even if they do not know

them with accuracy. That, with the acceptance by the husband of the fact that he *must* make some sort of allowance, afford a foundation upon which a fair consent order can be cheaply arranged.

These situations are not exceptional. In fact, they could be multiplied in other directions. Needless, and sometimes abortive process should therefore be avoided, and they can be, if the unfortunately rare virtue of common sense be exercised by both parties. Excessive bill of costs cut both ways, for all parties are penalized by them. The husband, directly, for he has to pay them; the wife, indirectly, for they eat into the husband's capital, or temporarily reduce his income, to both of which she looks for the payment of her allowance; the named woman, indirectly, for they financially embarrass the person whom she may hope to marry.

From the point of view of costs, litigants may be divided into two classes. There are those whose financial position is such that all the costs of the proceedings must be paid by one or other of the parties. Then there are those whose financial position precludes the payment of an ordinary bill of costs. The latter class usually avail themselves of the poor person procedure. This procedure is very limited in its operation, but indications go to show that it will be considerably extended in the near future, and become available to that large class of people who are neither rich enough to pay a full bill of costs, nor poor enough to come within the scope of the poor person rules.

As the principles underlying the liabilities of both class of litigants differ very greatly, special attention must be paid to each.

PAYING CASES

Paying cases are those in which all costs of whatever nature must be paid by the petitioner, or by the party to the suit who is condemned to pay them. There is no gratuitous assistance available, either wholly or in part, whether in the way of exemption from court fees, in the preparation of papers, or in the conduct of the suit.

When the client first consults his solicitor, he is anxious to know the probable costs of the proceedings, and the extent of his liability. On the other hand, the solicitor is equally anxious to know the financial position of his client, and to whom he may look for the payment of his costs. The client's problem is difficult of solution. It can only be met by the vague statement that the costs should not exceed a certain figure. This figure would be a rough estimate of the probable costs, based on a rapid review of

the circumstances of the case, and the probable costs of process. It would be a rash solicitor who would bind himself to a definite figure, and it is very rare that one can be found who will do so. When a case is undertaken for a fixed all-in payment, the client can be assured that it is on the side favourable to the solicitor, for, in his own protection, a good margin must be allowed for contingencies and unforeseen expenses.

The solicitor's problem is usually met by the payment by the client of a sum of money on account, and an assurance that further sums will be forthcoming when the original payment has been expended. This is the only basis upon which a solicitor may undertake a case. He cannot come to an agreement whereby the payment of his expenses and fees are dependent upon the court condemning some person, other than his client, in the costs of the proceedings. In other words, he cannot undertake a suit on the understanding that the payment of his costs shall depend upon results. To do so, would be unprofessional, and even criminal, for such an arrangement constitutes the offence of champerty.

A client is always responsible for the payment of the costs of his solicitor, whatever the result of the suit may be. He has instructed him to act, and those instructions carry with them a legal liability to pay the costs. The position is therefore that the client has to put up the money, with a possible refund of part of it, if someone else is ordered by a judge to pay the costs of the proceedings. But there is no certainty about the latter, for even if such an order be obtained, it does not necessarily follow that it can be enforced. It may be that the person condemned in costs has no property or income out of which they could be paid, or that he is so artful and elusive that process to compel him to pay would be so protracted and worrying as to make the enforcement of the order not worth while. It must be remembered that the laws of Britain are most tender and merciful to debtors.

It is very rare that the person condemned in the costs of proceedings has to pay *all* the costs that have been incurred. He can only be compelled to pay such costs as have been allowed by a taxing officer of the court. Costs can therefore be divided into two classes,—those which have to be paid by the person condemned to pay them, commonly known as "party and party" costs, and those which have to be paid by the client, commonly known as "solicitor and client" costs.

Party and party costs

Party and party costs are those which a judge has ordered shall be paid by a named person, other than the petitioner. It is only

in very rare cases that the judge fixes the sum that shall be paid, and when that is done, the sum mentioned is a maximum figure which does not apply unless the taxed costs amount to, or exceed that figure. In the great majority of cases, the amount of costs to be paid under the order is determined by a taxing officer, to whom a detailed account must be submitted for examination. This process is known as the "taxation of a bill of costs".

The taxing officers are officials of the court who have great experience in the costs of litigation, and they exercise very wide powers. Where any items of a bill are excessive, they are reduced to a reasonable figure; where unnecessary expenses have been incurred, they are disallowed. Sometimes big fees have been paid to expert witnesses, or fashionable and expensive counsel has been employed. When this occurs, the taxing officer will reduce the fees to sums that are reasonable having regard to the professional status of the experts, and assess the fees to counsel in proportion to the legal difficulties of the case. If there be errors in the court fees paid, the taxing officer will correct them to those laid down by the Fees Rule. The process of taxation of a bill of costs is therefore a careful dissection of it, and when completed, the total is the maximum that can be obtained from the person condemned to pay them.

At a taxation, all parties may be represented, and have the right of being heard on any of the items of the bill. Notice of the appointment before the taxing officer must therefore be given to all persons who have entered an appearance in the suit, so that they may have the opportunity of objecting to any particular items. They cannot be heard on their liability to pay the costs, for that has already been decided by a judge, and cannot be reviewed.

If after the taxation of a bill, a party still objects to the bill as taxed, he may raise objections to the taxation. These must set out the items of the bill that are still objected to, and the grounds for the objection. They are again examined by the taxing officer, who gives his final decision and observations in writing. If the dissatisfaction still remains, application may be made to a judge to review the taxation. Such a review is unlikely to be successful, unless it can be established that the taxing officer proceeded on wrong principles, or that he did not exercise his discretions in a judicial manner.

Solicitor and client costs

There still remain outstanding the costs incurred before the suit was begun, and the costs disallowed at the taxation of the party

and party bill of costs. These fall to be paid by the client, and constitute the solicitor and client bill of costs.

An example of costs that would have been incurred before the commencement of the proceedings, would be the fees and expenses of enquiry agents. If their work did not lead to the discovery of evidence that was placed before the court, their fees and expenses cannot be regarded as part of the costs of the suit. They will therefore have to be paid by the client, for it was on his instructions that the enquiry agents were employed. A common example of costs incurred before the presentation of a petition, and which do not form part of the admissible costs of the suit, arises out of suits for nullity of marriage on the grounds of sexual incapacity. Often, before launching a petition, the solicitor and his client are desirous of making certain that the client is not the party to blame, or that the condition of the client supports the story she tells. An examination by an obstetric consultant therefore takes place. But as the court is not guided by his report, but by the report of the inspectors appointed by the court, the costs of the preliminary examination are not allowed.

The costs disallowed on the taxation of the party and party bill of costs have already been mentioned. They have already been paid out of the client's money, and there is no right of reimbursement from anyone else.

In the generality of cases, the settlement of a solicitor and client bill of costs is a matter of agreement between them, but if the client is of opinion that it is excessive, there is a remedy by way of taxation. This calls for the intervention of another solicitor, who, if negotiations for the reduction of the amount of the bill fail, will lodge it for taxation in the registry in which the proceedings were taken. But special rules attach to this form of taxation, and the exercise of the right to tax a solicitor and client bill of costs may prove a double-edged tool. To avoid the congestion of the taxing departments of the court by unreasonable and unnecessary taxations, and to prevent the time of the taxing officers being wasted over what may be just haggling over small sums, the Rules provide, that where, after such a taxation, the disputed bill of costs has not been reduced by at least one sixth of its original amount, the costs incurred by the taxation shall be paid by the person who applied for it. Of course, if the taxing officer reduces the bill by one sixth, the solicitor whose bill it was, not only has his bill reduced, but has to pay all the costs incurred by the taxation. In view of the Rules, a client should take the best advice to ensure that he is on safe ground, before he resorts to the taxation of the bill presented to him by his solicitor.

Costs as "Necessaries"

Under the common law, a husband is responsible for debts incurred by his wife for "necessaries", and to that extent, she has an implied authority to pledge his credit. But immediately a wife commits adultery, the authority comes to an end, and the responsibility of the husband ceases.

This principle applies to costs in divorce matters. Provided a solicitor can show that a suit was brought, or defended by a wife on grounds which were reasonable, he has an enforceable claim against the husband for the payment of his costs as necessaries. The right is not confined to cases where the wife has been successful, for her husband is responsible even if her case be unsuccessful, provided it was pursued on reasonable grounds and with due care and diligence.

The matter becomes of great importance when solicitor and client costs are concerned. The court may make an order against the husband as to costs, but as has been seen, the order is confined to "party and party" costs. The solicitor and client bill still remains to be paid. If the husband will not pay it, action may be taken to compel him to do so, on the ground that they represent expenses which were incurred as "necessaries".

It is only when the wife has committed adultery that the rule does not apply, and this is so even if the solicitor were unaware of the fact that she had committed adultery. In such a case, he has no claim against the husband for costs incurred since the date upon which she committed adultery, and cannot recover them on the plea that they were "necessaries". It therefore follows that if a solicitor represents a wife charged with adultery, and her defence fails, he has no remedy to recover his costs other than the order which the divorce judge may make.

POOR PERSON COSTS

Poor person cases in the civil jurisdiction of the courts must not be confused with those where legal aid is granted in criminal proceedings. Legal aid in criminal proceedings is obtained by application to the magistrates, or to the judge who tries the case. If the application be granted, a solicitor and counsel are assigned, and payment for their services is made through the local authority, in accordance with a fixed scale. Leave to proceed as a poor person in matters within the civil jurisdiction of the courts is granted by an unofficial body, and the judges and officials of the court concerned have no power to grant the leave. The solicitor and counsel assigned to the case receive no payment for the

services, and the charge on public funds is so small as to be negligible. All poor person cases are governed by the Rules of the Supreme Court, but apart from that fact, the courts have no powers. The working of the Rules, and the admission of persons to sue, defend, or proceed under them, are the work of the legal professions,—in the main, of the Law Society.

There is much misconception by the public at large between the legal aid and poor person procedures, with the result that the vast debt owed to the legal professions in the latter class of case, is forgotten. Credit to an immeasurable extent must be given to both barristers and solicitors who freely and voluntarily give their services in making the Poor Person Rules a success. Without their aid, the Rules would be a dead letter. In no circumstances may a barrister receive any payment for his services, and the circumstances must be most exceptional before a solicitor may receive the smallest payment for the professional services that he has rendered. (These exceptional circumstances have been dealt with previously under "Orders for Costs", *ante* Chap. III, p. 60.) They may not make any charge even for stationery, office or travelling expenses, so that it can be readily seen that the conduct of a poor person suit may be an expense to both the barrister and the solicitor concerned. The only payment that a poor person is called upon to make, is the deposit of a small sum of money (usually about £5) with the local law society who granted the certificate. This deposit is used to pay the actual out of pocket expenses that the case calls for, and any balance that remains, is returnable to the person making the deposit.

The courts themselves contribute to the working of the Rules by exempting poor persons from the payment of court fees. That concession, and the grant by the Treasury of a comparatively small sum of money (about £11,000) to cover the salaries and expenses of the Poor Person Committees dotted all over the country, are the limits of governmental assistance.

Who may be admitted as poor persons

There are income and property limits to those who may be admitted to take, defend, or be a party to proceedings as a poor person. The Rules[1] provide that the income of an applicant from all sources shall not exceed £2 (in special circumstances, £4) per week, and that he shall not be possessed of property of greater value than £50 (in special circumstances, £100). In arriving at the value of property, wearing apparel, tools of trade, and anything recovered in the proceedings are excluded.

[1] Rules of the Supreme Court, Order 16, Rule 23.

When a wife is the applicant, she must establish that the income of herself and her husband does not exceed the limit of £2 (in special circumstances, £4), and that they do not together possess property of greater value than £50 (in special circumstances, £100).

It oftens happens that a wife does not know the amount of her husband's income, nor the value of the property that he owns. In such cases, a committee may admit her on what is called a limited certificate. This is one that will allow the suit to proceed under the Poor Person Rules up to the stage of setting it down for trial or hearing (*ante*, Chap. III, p. 55). By the time this stage has been reached, the solicitor assigned to act on her behalf, may have obtained information as to her husband's means. If he has not been able to do so, or if the information obtained goes to show that they are within the limits laid down by the Rules, the committee will extend the certificate to cover the proceedings to their conclusion; if he has discovered that the husband is in such a position as to place him outside the Rules, he will apply for security for the wife's costs (*ante*, Chap. III, p. 56) on the basis that the suit will be continued as a paying case. The certificate will then come to an end with the making of the order for security, and on the solicitor's undertaking that he will conduct the suit to its conclusion.

The income and property limits laid down by the Rules are far too low, with the result that a great number of deserving cases have to be rejected. But the committees are usually most generous in their interpretation of them. The term "special circumstances" has never been defined, and the existence of a large family, or of other persons dependent on the applicant, are factors that have a great bearing on the decisions of a committee. The most sympathetic consideration is given to all facts that are placed before it. Unfortunately, the problem is complicated by applications from people who are possessed of sufficient means to pay ordinary costs, but who take advantage of the procedure in an endeavour to obtain cheap law. When a committee has made a decision as to an admission under the Rules, there can be no appeal from it.

How application is made

Persons who are desirous of being admitted as poor persons, should apply to the Secretary of the Poor Person Committee of the Law Society in the town or county in which they reside. If there be any difficulty as to this, the application may be made to the Secretary of the Poor Person Committee of the Law Society,

Royal Courts of Justice, Strand, London, W.C.2, who will put the applicant in touch with the appropriate local committee.

The forms of application that are supplied must be completed very carefully. This applies very particularly to the form upon which the income and property of the applicant is set out, for it has to be supported by a statutory declaration. The effect of this is that if any wilful material mis-statement is made, it may be punished as though perjury had been committed.

When the completed forms of application are returned, the matter is referred to a solicitor for investigation. If he reports favourably on the application, the committee will issue its certificate, and call upon the applicant to deposit a small sum of money (in normal cases, £5) to cover the out of pocket expenses of the suit. A solicitor and counsel will then be assigned to conduct the suit. They may not abandon it, nor may the applicant change or discharge them without the leave of the committee which granted the certificate.

MEMBERS OF THE FORCES

The Poor Person Rules have been extended so as to apply to certain ranks of the armed forces of the Crown. The privilege extends to all branches of the forces, regardless of sex, and to the wives of members of the forces. The terms of the Rule[1] are not identical with that applicable to civilians, and special attention must be paid to the following differences.

1. The privilege is available to members of any arm of the services who are not above the rank of petty officer, petty officer wren, or sergeant, or to the wife of any such person (she not being herself a member of the forces).
2. No income or property limits are imposed, but the income and property of the applicant, or owned jointly by the applicant and her husband, must not be such as, in the opinion of the committee, render it unreasonable that the applicant should be admitted as a poor person. There is therefore a far greater discretion vested in the committee than under the rule applicable to civilians. In arriving at the income of the applicant, pay and emoluments received as a member of the forces are excluded.

How application is made

If the applicant be a member of the forces, application in the first place should be made to the commanding officer of his

[1] Rules of the Supreme Court, Order 16, Rule 23 A.

unit, or to the unit legal advice bureau, who will supply the necessary forms of application. When these are completed, they must be sent through the applicant's unit to the Command Legal Aid Section, which will supervise the preparation of the case, and submit it to the appropriate Poor Person Committee of the Law Society.

Where the applicant is the wife of a member of the forces within the prescribed ranks (not being herself a member of the forces), application should be made in the same manner as is applicable to an ordinary civilian applicant (*supra*, p. 104).

CHAPTER VII

YESTERDAY AND TODAY

WHEN THE TREMENDOUS numbers of divorces that are granted each year are considered, it can hardly be realized that facilities for divorce are of comparatively modern origin. It is not ninety years since divorce became a matter of right, and available to the general public. It is only just over thirty years ago since it was brought within the reach of the poorest in the land by the introduction of the Poor Person Rules. Tracing the history of the development of matrimonial reliefs through the ages is an interesting study, not only in the law, but in the changes which have come to pass in human thought and ideas, and which have resulted in the position that is found at the present day.

YESTERDAY

In the earliest times, marriage was a natural institution designed to prevent confusion in the tribe, and to regulate the descent of property. It is probably the oldest institution known to community life. Later, it took on a religious aspect, and is today a curious blend of religion and contract. In the earliest religious form, the ceremony took place before the Gods, who bestowed their blessing upon the parties to it. The civil laws imposed rights and duties upon them, though in the main, the rights were those of the husband, and the duties those of the wife. In legal theory, the bonds could not easily be broken, and most codes of law strictly defined the grounds upon which this could be done. These varied with the civilized development of the state. In some, the marriage could be dissolved at will; in others, a ponderous and exacting code of law made its dissolution a matter of great difficulty, not to be lightly undertaken, nor to be undertaken

without ample means to ensure it. In these latter states, the strictness of the tie made marriage an unpopular institution, and less binding forms of union were contracted. These might vary from marriage in its highest and truest form, through intermediate stages down to recognized concubinage. In process of time, all these forms became accepted by the state as valid marriages.

Pre-Reformation times

With the coming of Christianity, the ceremony of marriage took on more of a religious significance, until in some communities it was elevated to a sacrament. More and more the Church emphasized that those whom God had joined together, could not, by man, be put asunder. Since they could not be put asunder by man, they could only be put asunder by God, and the Church, as representative of God upon earth, claimed and obtained an exclusive jurisdiction in matrimonial matters. Very early in the thirteenth century, the Pope Innocent the Third ordained that marriages in Christian communities could only be celebrated in a church, and that the presence of a priest, and the bestowal of his benediction were an essential part of the ceremony. The priests of the Church were alone authorized to celebrate marriages; the synods of the Church were alone to determine the laws relating to the sacrament of marriage.

But there is no reason to believe that marriage in those early times was a happier institution than it is today. The devil even then had a hand in bringing people together. Natures were not always compatible; angelic tempers not the rule; the other woman none the less desirable, and adultery, even though punishable by the criminal as well as by the social laws of the time, might have been well worth the risk. The Church could not ignore the unhappiness often arising out of marriage, and mercifully decreed that couples could part, but only so long as there was no infringement of the doctrine that a valid marriage could never be completely dissolved except by death. That doctrine had become a fundamental in the creed of the Church.

Earliest forms of relief

The highest remedy afforded by the Church was a decree of annulment. That is to say, the Church might declare that a valid marriage had never taken place, and so could have no existence. The ceremony of marriage having been a nullity, there were no marriage ties, and the parties could re-marry. That any children born of the union were thereby bastardized, was a matter of little

importance, despite the fact that in those days the stain of illegitimacy was a severe handicap to him who bore it.

Among the earliest ground for annulling a marriage was the incapacity of one of the parties to consummate it. This has always been a ground for setting aside a marriage, and is found in almost every legal system. Its justification lies in the fact that the incapacity strikes at the primary purpose of marriage in all communities,—the procreation of children, and the propagation of the species. But other grounds for annulment existed, and these were added to as the demands for freedom increased. Chief among them was the blood relationship of the parties to the marriage. The prohibition of the marriage of close blood relations is a eugenic measure called for by the harmful effects of such marriages upon the race. It is a salutary prohibition even to be found in the laws of the most primitive tribes. But the religion of the more civilised communities extended the prohibition to those who were related by law, through the marriage of other members of the family or tribe. The Christian religion followed the rules laid down by Moses,[1] and there resulted an elaborate table of affinity setting out the degrees of relationship within which there could be no lawful marriage. That table of affinity still appears in the Book of Common Prayer in use today, and with certain statutory exceptions, is the law of the land. The marriage of persons within the degrees of relationship mentioned in it, is a nullity.

As the Christian religion developed, there was an enlargement of its doctrines, and an elaboration of its ceremonies. The prohibition of the Church upon the marriage of blood relations, and of certain relations by law, was extended to those who stood in spiritual affinity to each other. The canons of the Church held that there was affinity between a Godparent and his Godchild, and some sects hold so today. They might not, and may not marry. And so the grounds for the annulment of a marriage were being continuously extended, and the elasticity of the doctrine was stretched almost beyond the bounds of human credibility. The limit must have been reached when it was held in an ecclesiastical court that a marriage must be annulled because the husband had stood Godfather to his wife's cousin. This elaboration of the doctrines of physical and spiritual affinity gave rise to untold

[1] "And if a man shall lie with his uncle's wife . . . they shall die childless. And if a man shall take his brother's wife . . . they shall be childless." (Leviticus XX, 20.) The prohibitions were probably aimed at the avoidance of confusion within the tribe, or a judgment upon adultery. They are evidently not a statement of a biological fact.

difficulties, especially when a marriage of persons within the prohibited degrees was contemplated. These could only be overcome by an appeal to the Pope, with a further elaboration of the complicated system of special Papal dispensations.

The ceremony of marriage itself became more elaborate, and there were often two stages, that of betrothal, and that of marriage. Whether the ceremony of betrothal was binding, and if so, to what extent, became a vexed question to the exponents of the canon law. But it is clear that a ceremony of betrothal was a form of contract to marry, and this in turn gave rise to another ground upon which a marriage could be annulled,—that of pre-contract of marriage. If either of the parties to the betrothal ceremony married some other person, that marriage could be annulled on the ground of a pre-contract of marriage.

The first adventure of Henry VIII into matrimony showed up the confusion into which the marriage laws had fallen. Betrothal, pre-contract, incestuous relationship, bastardization of issue, and even the succession to the Crown became inextricably mixed. The authorities of both Church and State were faced with an almost insoluble problem. If Catherine of Aragon had previously married Prince Arthur, her marriage with Prince Henry was one that was prohibited by the laws of affinity. It was incestuous, and the issue of it a bastard. The ecclesiasts and the ecclesiastical lawyers dare not judge on the basis of the canon law, for the parties to the marriage and their "in laws" were powers in the Europe of that day, and champions of Christendom. A decision in favour of either side would cause the estrangement of powerful allies of the Church. The only possible course was to play for time, and issue was piled upon issue, until the resulting confusion was cleared by the violent act of the King in annulling his own marriage. He scorned its annulment by the Church and the legal quibbles that were raised by it. It may be an open question whether the separation of the Church of England from that of Rome was inevitable, but there is no doubt that the actual breakaway was the result of the confusion of the laws of marriage and divorce, and the determination of a headstrong and lustful king.

But there was another remedy, or perhaps it might be better to say an amelioration of conditions, which was granted by the Church to those who were unhappily married. In the legal theory of those days, there were two forms of divorce, bearing the vividly descriptive names of divorce *a vinculo matrimonii* and divorce *a mensa et a thoro*, the one being a release from the "chains of matrimony", and the other a separation from "bed and board".

The former infringed the doctrines of the indissolubility of marriage, and was therefore probibited by the Church; the latter was a mere mitigation of conditions, for it relieved the parties of their obligation to cohabit. That was the only form of divorce that the Church recognized, and it was the only remedy, other than an annulment of the marriage, that its courts granted. In every diocese, the Bishop held his court and heard the plaints. At a later date, his authority was delegated to an ecclesiastical lawyer, who became known as the Chancellor. Where the grounds of complaint were adultery, cruelty or unnatural offences, the court would grant a divorce *a mensa et a thoro*. If the ground of complaint were desertion, the court would issue its command by a decree of restitution of conjugal rights, whereby the offending spouse was ordered to return and render conjugal rights to the injured party. Disobedience to the decree amounted to contumacy of a decree of the Church, and could be visited by excommunication and its attendant disabilities. A very serious matter in those days.

A person falsely alleging that he or she was married to another, so that a marriage by reputation might possibly follow, could be silenced by a suit for jactitation of marriage. Such suits were not uncommon, for the allegations were made possible by the absence of a universal and compulsory system of the registration of marriages. At the time of a marriage, an entry of it might possibly be made in the parish register, and a certificate known as "marriage lines" given to the woman. If no entry were made in the parish register, or if that book were destroyed or lost, the marriage lines were the best evidence of the marriage. Great care was therefore taken of that document, for it might be the only evidence in proof of the honesty of a woman who claimed to be lawfully married. Even today, a marriage certificate bears a measure of the former sanctity of the marriage lines, for it is the invariable custom to give it to the woman after the marriage ceremony. In some sections of the community, it is still treasured as though it were the only proof of a woman's claim to be numbered among the privileged class of married women. But if the marriage lines were also lost or destroyed, there was no record of the marriage, and it could only be established by the evidence of the witnesses of the ceremony, or the acquirement of a legal married status by reputation. These defects of record sometimes made it possible for a person to assert that he or she was lawfully married to a certain person. If that assertion were made over a period of time, a marriage by reputation might be established, with the consequent legitimation of the offspring of any cohabitation there might have been. If complaint were made,

the courts of the Church would adjudge the matter. In the absence of documentary evidence of the marriage, and if it could not be established that the parties had lived together as man and wife over such a period that it could be presumed that they had been lawfully married, the person making the assertion was enjoined "for ever after to hold peace" on the subject. A repetition of the allegation was contumacious, and the offender could be excommunicated, so becoming an outlaw and an outcast among the people.

These were the remedies granted by the Church. No further could the bishop go, and no further could the higher ecclesiastical courts go, unless the parties were influential and possessed of ample means. In such a case, appeal might be made, even to the Pope himself,[1] and the marriage might be annulled for little or no reason. To the masses of the people, the remedies were of little, if of any value. The process of law was too costly, too intricate, and too involved for the ordinary man to have recourse to it. He either had to suffer his matrimonial unhappiness, or had to solve his problems in his own way, at the cost of his reputation by being numbered among the notorious evil livers of the day.

The judges of the ecclesiastical courts would not hear a petition, whatever its merits, unless the petitioner came before them with "clean hands". This requirement called for a minute examination, not only of the facts of the complaint, but of the conduct of the parties. The slightest moral slip on the part of the seeker for relief, was fatal to success. Whether or no collusion or connivance existed, a searching enquiry was made into the possible existence of both offences. If the conduct of the petitioner remotely conduced to the offence of which complaint was made, the penalty paid was the dismissal of the petition. It sometimes would appear that the conduct of the petitioner was of more importance than the offences charged.

The costs of taking proceedings was tremendous, and it was not to the advantage of the judges, or of the officers of the court, or of the lawyers, to be expeditious in the hearing of the matter, or in the giving of a judgment. In some of the courts the salaries of the judges were paid by a daily fee payable by the parties to the action, a system hardly conducive to the dignity of the court, or to the rapid determination of the matters before it.

The Reformation period

But with the Reformation, not only were the doctrines of the Church challenged, but the administration of the ecclesiastical

[1] Appeals to the Pope were prohibited in 1532 by the Statute of Appeals.

laws fell for strict examination. Their administration had resulted in such a mass of confusion and contradictory decisions that even the lawyers practising in those courts could not tell with certainty what the effect of the law was. At one time, it was possible to hold that a decree of divorce *a mensa et a thoro* entitled the parties to remarry,[1] though at a later date, the Court of the Star Chamber explicitly declared that a marriage validly contracted, could not be dissolved for any cause whatever.[2] The feeling on the matter was such, that by an Act of one of the later Parliaments of Henry VIII, a Commission was appointed to consider the administration of ecclesiastical law, and the possibilities of its reform. The Commissioners were undoubtedly men of broad views and of great understanding, for their report anticipated that of the Royal Commission of 1910. It recommended the abolition of divorce *a mensa et a thoro*, and substituted for it a complete divorce on the grounds of adultery, desertion, or cruelty.[3] But the religious changes of the reign of Mary did not allow of any action to be taken on it. When the Protestant religion was restored, there were many attempts to bring about change, but none by way of legislation. In a few cases, the Court of Chancery took upon itself to grant complete divorces in the exercise of its equitable jurisdiction, but the first appreciable change did not take place until the Restoration. In that period, it became customary to petition Parliament by means of a private bill for a complete divorce, and the procedure of a Bill of Divorcement became the recognized manner in which a divorce *a vinculo matrimonii* could be obtained. The only offence upon which it could be presented was adultery, and an elaborate procedure preceded its presentation. The first stage was to take proceedings in the ecclesiastical courts for a divorce *a mensa et a thoro*. If a husband were the petitioner, this had to be followed by an action in the courts of common law for "criminal conversation", which was an action for the recovery of damages brought against the wife's paramour. If no action were brought, or if the action were unsuccessful, a satisfactory explanation had to be given before the bill would be considered. In this manner, Parliament safeguarded itself against the possibility of collusion or connivance, or the existence of any discretionary bars to relief which the ecclesiastical courts enforced. Finally, the petitioner was required to appear before the Bar of the House of Lords to be examined on the merits of his petition. If the House was satisfied, the bill

[1] Marquis of Northampton's Case, 1542.
[2] Foljambe's Case, 1602.
[3] *Reformatio Legum*, published in the reign of Edward VI.

passed, and the parties to the marriage were free to re-marry, unless, in the meantime, they had become too old to desire to do so.

Strange as it may appear, this cumbrous and expensive procedure was followed until the middle of the nineteenth century. The only thing that can be said in its favour was the insistence of Parliament that a divorced wife should not be left destitute. It was most careful as to this, and there came into existence an official who became known as the "Ladies' Friend". His functions were to negotiate and arrange maintenance, or other suitable provision for a divorced wife.

Needless to say, there were not many bills of divorcement, for the costs of the proceedings, and the cold, unsympathetic attitude of society towards those who bore the taint of divorce, made relief available only to those possessed of ample means, and who were proof against the slights and gibes of their neighbours. It was not that people did not want to be divorced, but that they could not, or dare not. The number of recorded bills is a comment on the ineffectiveness of the procedure. Before the first George, there is a record of only five, but succeeding reigns showed an increase. In the period 1715-1852, there was an average of 1.4 a year.

The great masses of the people could not avail themselves of the opportunity for freedom which was offered at such a tremendous cost of time, money, and reputation. The law was in favour of the rich only, for though in legal theory, it was the same for the rich and the poor, the poor were too poor to avail themselves of it. The result was that the standard of morality in the country was very low, and the system of keeping mistresses, or having a lover, was common. Feeling on the question was very strong, and the question of the reform of the divorce laws was very much in the minds of thinking men, other than those whose religious convictions would not tolerate divorce. Matters came to a head when one of Her Majesty's judges ironically summarized the procedure to obtain a divorce, when sentencing a prisoner found guilty of bigamy.

1851

"Prisoner at the Bar. You have been convicted of the offence of bigamy, that is to say, of marrying a woman while you had a wife still alive, though it is true that she has deserted you, and is living in adultery with another man. You have therefore committed a crime against the laws of your country, and you have also acted under a very serious misapprehension of the course you ought to have pursued. Every Englishman is bound to know that there is

a remedy for every wrong, and I will tell you what you ought to have done. You should, on hearing of your wife's adultery, have commenced an action against her seducer, and obtained counsel and witnesses so as to get substantial damages against the adulterer. You should then have obtained a proctor and counsel in another suit in the ecclesiastical courts, so as to get a divorce *a mensa et a thoro*. Armed with these decrees, you should have approached the legislature, and obtained a private Act of Parliament which would have rendered you free and legally competent to marry the person whom you have taken upon yourself to marry with no such sanction. It is quite true that these proceedings would have cost you hundreds of pounds, whereas you have probably not so many pence. The law, however, has nothing to do with that. It knows no difference between rich and poor. The sentence of the court upon you is that you be imprisoned for one day, which period has already been exceeded, as you have been in custody since the commencement of the assizes."[1]

Matrimonial Causes Act, 1857

Such an exposure of the futility of the remedies offered by the law could not pass unnoticed, and both in the country and in Parliament there arose a clamour for the reform of the divorce laws. In 1852, a Royal Commission was appointed to examine the matter. Its report was so forceful that it could not be shelved, and in 1857, the first Matrimonial Causes Act appeared on the statute book. For the first time in the history of this country, the law of divorce was defined, and brought within the reach of a far greater section of the community than had previously been the case.

Judged from modern standards, the Act was very narrow in the relief that it offered, though it was a tremendous advance made in the face of the violent opposition of the Church, and of the vested interests it abolished. It transferred the jurisdiction of the ecclesiastical courts in matrimonial matters to a new court known as the Court for Divorce and Matrimonial Causes. The only jurisdiction left to the Church was over the issue of marriage licences.

The new court was empowered to grant decrees of complete divorce. If a husband sought relief, a decree could only be granted on proof of the adultery of his wife; if a wife sought relief, it could only be granted on proof of the adultery of her husband, *and* of one of the following offences—incest, rape, sodomy, bigamy, cruelty, or desertion. Women were therefore not placed upon an

[1] Maule J. at Warwick Assizes, 1851.

equality with men. That reform took another sixty-five years to achieve.

The decree of divorce *a mensa et a thoro* was abolished. In its place, the court might grant a decree of judicial separation on the same grounds as a divorce *a mensa et a thoro* could have been obtained. To these, there was added a new ground for relief, that of desertion for a period of two years and upwards. A decree of restitution of conjugal rights thus ceased to be the only remedy for desertion.

The action at common law for damages for criminal conversation was also abolished, and it was provided that a claim for damages could form part of a husband's petition for divorce or judicial separation.

The bars to relief imposed by the ecclesiastical courts were retained, but there was a mitigation of their application by their division into absolute and discretionary bars.

In the early days of the working of the Act, its provisions were put into operation with all the rigour and narrowness of outlook that characterized the old ecclesiastical courts, but with the passage of time there came a gradual softening of the harshness of their application. The age of Victorian morality was passing, and public opinion was gradually undergoing changes which had a reflection in the attitude of the judges. The spirit, rather than the strict letter of the law was regarded, and soon there developed that sympathetic consideration for the weaknesses and imperfections of mankind, which today is a marked characteristic of the bench of divorce judges.

But it must not be thought that the increase in the number of applications for divorce which inevitably followed the extension of the grounds for relief, did not cause apprehension in the minds of those responsible for the passage of the Act. When, in 1859, the number of petitions for divorce reached the unprecedented number of three hundred, we find Lord Campbell, who had presided over the Commission, writing in his diary that he felt like Frankenstein,—afraid of the monster that he had called into existence, and dreading lest the prophecies of those who had opposed the Act, might be fulfilled by a lamentable multiplication of divorces, and by a corruption of public morals.[1] What the learned judge would have said had he envisaged a divorce cause list of today, passes imagination.

Although the reformers were not satisfied with the Act, they could not obtain the support of any political party in their

[1] Lord Campbell's Diary, 10th January, 1859, quoted *Solicitor's Journal*, 20th October, 1945.

endeavours to extend its scope. Then, as now, no political party dare take the risk of losing the votes of the strong religious minority which opposed any extension of the law. The most that any government would do was to legislate on minor matters and for the next sixty-five years, there are only to be found a few amending Acts, dealing with alimony and maintenance, and with the grant of powers of intervention by the King's Proctor, where there had been deceit, or a concealment of the true facts of the case from the court.

Royal Commission of 1910

As time rolled on, the inadequacy of the divorce laws became more evident. In 1909, Lord Gorell, the then President of the Probate, Divorce and Admiralty Division of the High Court of Justice, raised the matter in the House of Lords, and a Royal Commission was appointed, under his chairmanship, to examine the question. The members of the Commission represented all shades of opinion, and made a thorough examination of the history, development, and administration of the law of divorce. The findings of the Commission were published in 1912, in the form of majority and minority reports.

The majority report recommends sweeping reforms, which included divorce on the grounds of desertion, cruelty, insanity, habitual drunkenness, and imprisonment following a commuted death sentence; nullity, on the grounds of epilepsy, recurrent fits of insanity, mental deficiency, venereal disease, wilful refusal to consummate the marriage, and pregnancy before marriage by some person other than the petitioner. It recommended that the remedy of judicial separation should be done away with, and that increased facilities should be granted to poor persons to present petitions. The application of the law of domicile as founding jurisdiction in divorce matters came in for severe comment, and it was recommended that a divorce in any part of the British Dominions should be valid if registered in the country of the domicile.

The minority report was more cautious, and in the main, advocated leaving matters much as they were. Its only recommendation was the placing of women on an equality with men as to the grounds for divorce. It is significant that the signatories of the minority report were only three in number, each of whom was a prominent member of the high church section of the Church of England.[1]

[1] The Archbishop of York (Dr. Cosmo Gordon Lang), Sir William Anson, and Sir Lewis Dibden.

As has frequently happened with the valuable reports of many Royal Commissions, both reports were allowed to remain a dead letter. Thirteen years were to pass before the smallest of the recommendations came to be enacted. In the meanwhile, private members endeavoured to introduce bills to reform the law, but their efforts met with no success. The introduction of the bills was so ill-timed, that they were either crowded out through pressure of government business, or were talked out. But these rebuffs did not discourage them, and it is to the private members that all the credit for subsequent legislation belongs.

1923

In 1923, a further Matrimonial Causes Act gave the force of law to the only recommendation contained in the minority report of the Royal Commission of 1910. At long last, women were on an equality with men, and proof of adultery alone was sufficient for them to obtain a divorce. But the recommendations of the majority report remained untouched for a further period of fourteen years.

Poor Person Procedure

None of the Matrimonial Causes Acts had done anything of real value to bring the remedies of the divorce court within the reach of the poorest sections of the community. The possession of ample means was still essential to the prosecution or defence of a suit. It is true that Rules were made under the Matrimonial Causes Act, 1857, enabling proceedings to be taken *in forma pauperis*, but apart from the stigma of pauperdom, they were cumbrous, inadequate and ineffective. In 1914, those Rules were abolished so far as the High Court was concerned, and a Poor Person Department of the High Court of Justice was created. At a later date, the business of this department was taken over by the Law Society, which continues to operate it today.

Restrictions of the Press

Scandal had attached to the publication of newspaper reports of divorce cases, and certain newspapers had made a feature of highly coloured reports and descriptions, with undue emphasis on the more sordid sexual aspects. There was nothing new in this, for it is said that Queen Victoria had once remarked that the Sunday newspapers were worse than the worst French novels. But the tide of public opinion had risen against such indecent publicity, and in 1926, restrictions were placed upon the publication of reports of divorce cases in the newspapers. Newspapers

were prohibited from reporting the details of divorce proceedings, other than particulars of the parties to the suit, the charge, and any legal submissions that might be made, any summing up of the judge, and the verdict or judgment given. But no prosecution of an offending newspaper was to be undertaken without the consent of the Attorney General.[1]

A further limitation upon publicity was made in 1935, when it was enacted that a judge might sit *in camera* when evidence as to sexual incapacity was to be given.[2] The effect of this limitation was to give a discretion to a judge to exclude the public and the press from the courtroom when such evidence was taken. Both restrictions are to be approved on the grounds of public decency and in the interests of justice, the one, in that it prevents the degradation of the press to a pornographic agency, and the other, that it removes that feeling of humiliation and embarrassment which is felt by most people in speaking in public of their intimate sexual experiences.

1937

Success crowned the efforts of the advocates of the majority report of the Royal Commission of 1910, when the Matrimonial Causes Act, 1937, passed into law. The bill was introduced by Sir (then Mr.) A. P. Herbert, who had long been in the forefront of the fight for the reform of the divorce laws. The members of the House of Commons indicated their approval of the proposed measure in no uncertain terms, and the government of the day was compelled to grant facilities for its discussion. Except that the bill was left to the free vote of the House, the government virtually adopted it. It suffered severely in its passage through both Houses of Parliament, but the main recommendations of the Royal Commission survived. On the 1st of January, 1937, it became law, and is today the Act that defines and regulates the grant of matrimonial relief in England and Wales.

TODAY

The excessive length of the present divorce lists has given rise to a feeling of disquiet amongst a great part of the population, and there is apprehension lest it signifies a permanent lowering in the standards of public morality. The position is, that applications for relief far exceed the facilities for their disposal, despite the increase in the number of divorce judges and the assistance of King's Bench judges going certain circuits. As soon as an

[1] Judicial Proceedings (Regulation of Reports) Act, 1926.
[2] Supreme Court of Judicature (Amendment) Act, 1935, S. 4.

impression has been made on the lists, it is effaced by the influx of new cases. This will probably continue for the next few years, until the inevitable aftermath of the war is disposed of, and normal working is restored.

It may well be that there has been a lowering of the standards of public morality, but the increase in the number of applications cannot entirely be accounted for by that fact. In an examination of the situation, it is necessary to take certain other important factors into consideration.

The first of these is that wars have always resulted in the disruption of home life, and this has inevitably reflected itself in an increased number of applications for divorce in the years following the return of peace. The reasons for this are numerous and various, and outside the scope of a book dealing with the legal principles of the law of divorce. The situation at the end of the First Great War was similar to that which exists today, for the statistics for the third year following the Armistice, show an increase of 220% over those preceding the outbreak of the war.[1] This increase was entirely the result of the war, for there had been no recent extension of the grounds for divorce, nor of the then existing poor person procedure. The position today cannot be assessed with complete accuracy, for it will not be possible to ascertain the full effect of the war upon the number of applications for divorce, until a few years after demobilization has been completed. But what figures are available show a similar trend to that which followed the 1914–1918 war. In the year 1939, 8,827 divorce petitions were filed; in the year 1944, this figure had increased to 19,086, being an increase of 116·2%.[2] This increase cannot be taken as a final maximum, for the later year quoted was a war year, and the effect of demobilization had not been felt.

A further factor to be considered is that the full effect of the Matrimonial Causes Act, 1937, had not been felt at the outbreak of the war. The natural result of any Act of Parliament which extends the grounds for divorce is an increase in the number of applications for relief. Every such Act has had that effect, and that of 1937 is no exception to the rule. It has already been mentioned that the operation of the Matrimonial Causes Act, 1857, increased the number of divorces from an average of 1.4 a year, to three hundred applications in the third year of its operation

[1] Civil Judicial Statistics, 1913 and 1920. The number of cases set down for trial in 1913, was 1,512; in 1920, it was 4,832.

[2] Owing to war conditions, the Civil Judicial Statistics for the years in question have not been published. The figures quoted have been supplied through the courtesy of the Statistical Department of the House of Lords.

(*supra*, p. 116). A similar result followed the passing of the Act of 1923. Although this Act merely extended the grounds for divorce by placing men and women upon an equal footing, the third year of its operation resulted in an increase of 130% in the number of wives' petitions, over those presented in the year 1922.[1] Owing to war conditions, statistical information for the recent war years has not yet been published, but what figures can be obtained show an increase of 49.2% in the number of petitions filed in 1939, as compared with those filed in the year immediately preceding the operation of the Matrimonial Causes Act, 1937.[2] The tendency to a big increase as a result of the extension of the grounds for divorce had already shown itself. It must have been considerably enlarged, and be still enlarging, today.

In the course of the Second Great War, the provisions of the Poor Person Rules were extended to apply to the lower ranks of the armed forces of the Crown. This had the effect of bringing facilities for divorce to a number of people who would otherwise have been outside the operation of the Rules. The number of poor person applications has therefore increased abnormally, showing an increase of 89·6% over the pre-war years.[3] This alone is a factor having a great bearing upon the present abnormal increase in divorce applications. It is only the limitations on clerical staff, resulting from the war, that has prevented the number of poor person certificates granted, reaching a far greater increase than this percentage shows, for a recent answer in the House of Lords disclosed that nearly 30,000 applications for certificates cannot at present be dealt with for that reason.

So although there has undoubtedly been a change in the outlook of the public towards divorce in the last decade or so, it cannot be held to account entirely for the post-war increase in the applications for relief. The three factors mentioned have a far greater effect, and are probably mainly responsible. It will not be possible to arrive at a final conclusion until a few more years have gone by, when it may be possible to make a study of the statistics without the complications of new legislation and war conditions. When normal times return, the figures will un-

[1] Civil Judicial Statistics, 1922 and 1926. The number of wives' petitions filed in 1922 was 1,639; in 1926, it was 3,782.

[2] Civil Judicial Statistics, 1936. The number of petitions filed in 1936 was 5,915; in 1939, it was 8,827. The figure for 1939 is supplied by the courtesy of the Statistical Department of the House of Lords.

[3] Number of Poor Person Certificates granted in 1936, was 3,571; in 1944, 6,771. These figures have been supplied by the courtesy of Mr. Adrian Hassard-Short, the Secretary of the Poor Person Committee of the Law Society.

doubtedly show a large increase over the pre-war years, but nothing like the abnormal figures that today presents.

The Matrimonial Causes Act of 1937 appears to have set a limit to the grounds for relief for some time to come. Until the full effect of its provisions on the family life of the country has been felt, it is unlikely that further divorce law reform will find its way to the statute book.[1] Of its clauses, that prohibiting applications for divorce within three years of marriage has operated most harshly. The clause did not appear in the bill as it was originally drafted, but was inserted in the course of its passage through Parliament. The reason for its insertion is not clear, unless it was a concession to those who opposed any extension of the grounds for divorce, and to those who had an ingenuous belief in the powers of persuasion which might result in reconciliation. To the average mind, the possibility of reconciliation would appear to be most remote, for the shock of the discovery of infidelity within such a short period of marriage as three years, would normally preclude forgiveness. The offence would have been committed in a period when husband and wife should be living in their happiest days, happy in their companionship and in the consummation of the love that they bore to each other. At this stage of married life, forgiveness would be less likely than at a much later stage, when the transports of the first years of marriage are a memory, having been transformed into the sedate, undemonstrative, but comfortable existence of established married life. But be that as it may, there is little doubt but that the clause has operated most harshly on marriages contracted immediately before, and during the war. The exigencies of war caused vast movements of the population, and the transfer of husbands to the distant parts of the earth. This resulted in the loss, and sometimes in the destruction of testimony. The evidence in support of the charges in a possible petition was gone, and third parties who would have been involved in the proceedings might have died, or be missing without the possibility of discovery. The saving clause in the section, which gave a discretion to a judge to waive the prohibition, was of little value, for the expense of the special procedure that had to be followed to obtain the waiver, and the uncertainty as to what would be held to amount to "exceptional hardship or depravity", discouraged many would be applicants. This was especially so, after the Court of Appeal held that there was not an exceptional hardship when a husband had been ordered on active service, and desired the probibition to be waived so that he might divorce his wife, who had had a child by another man.[2]

[1] The Denning Committee is solely concerned with practice and procedure.
[2] Reed *v.* Reed (unreported), June, 1942.

When this section of the Act was debated in both Houses of Parliament, its value was very much questioned. If it were questionable then, it is certainly more so today. It is significant that every attempt to introduce a similar clause in the Matrimonial Causes (War Marriages) Act, 1944, was strenuously opposed by the government of the day.

The doctrines that domicile alone gives jurisdiction to grant a complete divorce, and that the domicile of a wife must follow that of her husband, give rise to many difficulties. In certain well-defined circumstances such as, a change in the domicile of the husband following desertion or deportation, or marriages during the war with members of the allied forces, statutory exceptions have been made[1] (*ante*, Chap. I, p. 16). But there still remain those cases where a wife is resident in England or Wales, but the husband is domiciled in a state or country the laws of which do not permit of a complete divorce. There is no relief for the parties to such marriages.

Modern tendencies and scientific discoveries are likely to set problems which were never envisaged by those responsible for the framing of the present law of divorce. Within the last year, the effect of the not uncommon practice of contraception on the consummation of a marriage, has been considered by the courts. There is no legal definition of consummation, so that whether the act of physical intercourse alone constitutes consummation, or whether an interference in the course of that act, for the purpose of the prevention of the natural biological results of intercourse, is non-consummation, is very undecided. It has already been held by a superior court that an interference which takes the form of the use by the husband of a rubber sheath, or the practice of onanism, against the wishes of the wife, amounts to a wilful refusal to consummate the marriage, and is therefore a ground for annulment. Both the lower court and the Court of Appeal avoided giving an opinion on other forms of contraception.[2] The prevalence of the practice of contraception calls for the fullest consideration of the problems it presents, either by way of a decision of the House of Lords, or by legislative enactment.

The principles of artificial insemination have been applied to human beings, and will be the means whereby women desirous of giving birth to children, but who are married to sterile or otherwise undesirable husbands, may be able to satisfy their maternal instincts. But from the legal point of view, the questions im-

[1] Matrimonial Causes Act, 1937, S. 13; Matrimonial Causes (War Marriages) Act, 1944.

[2] Cowen (orse Smith) *v.* Cowen (1945), 61 T.L.R. 525.

mediately arise whether the product of such a process is offspring of the marriage, and whether the wife, in permitting the operation, is guilty of adultery.

As the law stands today, the child having been conceived during the subsistence of the marriage, the husband is prohibited from denying that he had access to her at the material time. He therefore cannot deny its paternity, and it is deemed to be lawful issue of the marriage (*ante*, Chap. I, p. 20). The responsibility for the maintenance and education of the child is the husband's, and under the laws of inheritance, it not only has an interest in his estate, but in any titles of honour that he may possess, even though in fact he is not the father. Even if the difficulties of the rule in *Russell v. Russell* were overcome, there may arise the medical difficulty of proving that the husband was sterile at the date of the conception of the child, for sterility may be periodic. If the wife has had recourse to the process of artificial insemination owing to the undesirability of the husband as a father, the difficulties become still more pronounced.

According to the present accepted definition of adultery, the wife cannot be guilty of that offence, for she has not had physical intercourse with a man other than her husband. A vast area of conjecture therefore opens out, and it is impossible to draw conclusions. Sooner or later the questions must come before the courts for decision, unless in the meantime legislation will have provided a solution of the problem.

In recent years, the question of granting facilities for legal aid has been much to the fore, and the existing system has come in for severe criticism. In 1944, a committee was appointed under the chairmanship of Lord Rushcliffe to examine the matter. It reported in the following year, and recommended drastic changes in the present system. Among its recommendations are[1]—

1. the use of the term "poor person" shall be discontinued, the term "assisted person" taking its place.
2. legal aid shall be available in all courts of justice, which are deemed to include coroner's courts, courts of special jurisdiction, and special tribunals where barristers and solicitors have the right of audience.
3. some form of legal aid shall be available to all persons in receipt of an income not exceeding £420 per annum, subject to property qualifications.
4. single persons in receipt of an income not exceeding £3 a week,

[1] *Report of the Rushcliffe Committee on Legal Aid and Legal Advice in England and Wales.* Command Paper 6641, May, 1945.

and married men in receipt of an income not exceeding £4 a week, shall not be required to pay any contribution towards the costs of proceedings.

5. where the income exceeds those set out in (4), the limit of the contribution to be paid by the assisted person shall be, in the case of a single person, one half of the difference between £156 and his income for one year; in the case of a married person, one half of the difference between £208 and his income for one year. (It is to be noted that the sums of £156 and £208 correspond to the incomes of £3 and £4 a week referred to in (4).)
6. all property and capital in excess of £25, in the case of a single person, or £50 in the case of a married person, shall be added to any contribution made out of income under (5).

The term income does not mean gross income, but the income of the assisted person after certain deductions are made, e.g., deductions that would be made by an Assistance Board, certain deductions in respect of each child dependent upon the assisted person, and income tax paid.

The scheme is recommended to be worked by the Law Society, and all the costs of working it shall be paid by the State. Barristers and solicitors engaged in assisted cases, should be paid the usual professional fees for their services.

The government has already announced its acceptance of certain of the recommendations, but as these have not been specified, it is not possible to anticipate to what extent the report will become law.

When it comes to an examination of the attitude of the general public towards divorce, a division into three classes of thought can be made,—a minority class of great power and influence to which divorce is anathema; a small minority class of little popularity and less power, which advocates revolutionary reforms; and a class which is prepared to accept things as they are for the present, but is prepared to advance whenever the necessity shows itself.

The first class is composed mainly of Roman Catholics and the High Church section of the Church of England, and of the Church in Wales. To its members, marriage is of the nature of a sacrament, and its indissolubility a fundamental of belief. It affirms the attitude of the Church through the ages, and is a matter of belief and faith. It has therefore to be accepted and respected, even though perhaps not understood.

The second class is composed of ultra-modern thinkers to whom marriage is a simple contract terminable at will. Its members are

not even united in advocating definitely expressed aims, for these aims vary from a large extension of the present grounds for divorce, down to companionate marriage and free love.

It is the third class that is important, for it is composed of that vast inarticulate mass of the population whose opinion, when formulated, decide the prospects of all aspects of national life. To the majority of its members, marriage is a civil contract, only to be set aside for certain well defined and serious causes. The religious element of the contract may be desirable, but it is more of an incident, or an adjunct to the contract. It is not an essential, and has no bearing on the continuance or dissolution of the marriage. This would appear to be the correct attitude.

To the mind of the average reasonable citizen, the question to be answered is whether a bad marriage should be perpetuated regardless of the unhappiness that results from it. The age has passed when the key to a happy marriage was "docility and a spaniel like affection . . . and the submissive demeanour of dependence". A characteristic of modern marriages is the frank and open relationship of the parties, and their consciousness that each has a distinct individuality. It is on this that the permanence of marriage must rest.

The integrity of marriage is a vital concern of the State, and it is for that reason that caution must be observed in the development of divorce. Slow progress, with a proper appreciation of the results of each step taken, is the only safe road. Any other road must inevitably lead to the morass of confusion and laxity of morals, in which some countries have already found themselves.

APPENDIX I

Assize and Provincial Courts having jurisdiction in Divorce, and the corresponding District Registries where the Cause Lists may be inspected.

TOWN	DISTRICT REGISTRY
Birmingham	Birmingham
Bodmin	Truro
Bristol	Bristol
Bury St. Edmunds	Ipswich
Caernarvon	Caernarvon
Cardiff (*or Swansea when the Assizes are held at Swansea*)	Cardiff (*or Swansea when the Assizes are held at Swansea*)
Carlisle	Carlisle
Carmarthen	Carmarthen
Chester	Chester
Derby	Derby
Durham	Durham
Exeter	Exeter
Gloucester	Gloucester
Ipswich	Ipswich
Leeds	Leeds
Leicester	Leicester
Lewes	Lewes (*Probate Registry*)
Lincoln	Lincoln
Liverpool	Liverpool
Manchester	Manchester
Newcastle	Newcastle
Newport (Mon.)	Newport (Mon.)
Norwich	Norwich
Nottingham	Nottingham
Shrewsbury	Shrewsbury
Swansea (*or Cardiff when the Assizes are held at Cardiff*)	Swansea (*or Cardiff when the Assizes are held at Cardiff*)
Winchester	Portsmouth
York	York

APPENDIX II

District Registries in which Divorce proceedings may be taken

Bedford	Carlisle	Leeds	Reading
Birkenhead	Carmarthen	Leicester	Sheffield
Birmingham	Chester	Lincoln	Shrewsbury
Blackburn	Coventry	Liverpool	Southampton
Blackpool	Derby	Maidstone	Southport
Bolton	Doncaster	Manchester	Stockport
Bournemouth	Durham	Newcastle	Stockton-
Bradford	Exeter	Newport (Mon.)	on-Tees
Brighton	Gloucester	Northampton	Sunderland
Bristol	Grimsby	Norwich	Swansea
Burnley	Hanley	Nottingham	Taunton
Bury	Huddersfield	Peterborough	Truro
Caernarvon	Halifax	Plymouth	Wakefield
Cambridge	Hull	Portsmouth	Wolverhampton
Cardiff	Ipswich	Preston	York

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Figures printed BOLD *indicate where the main information is to be found.*